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ARTICLE

DEVELOPING A FRAMEWORK FOR
EMPIRICAL RESEARCH ON THE
COMMON LAW: GENERAL PRINCIPLES
AND CASE STUDIES OF THE DECLINE
OF EMPLOYMENT-AT-WILL

Andrew P. Morriss[†]

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[I]n the twentieth century we have become increasingly sensitive to the fact that even in the sciences that depend crucially upon measurement (whether these include all sciences or only a majority of them), measurement alone is not enough. To serve the purposes of science, the measurement must be susceptible to comparison. And comparability of measurements requires some common understanding of their accuracy, some way of measuring and expressing the uncertainty in their values and the inferential statements derived from them.

STEPHEN M. STIGLER¹

I. INTRODUCTION

Through the use of statistical and econometric techniques, social scientists can offer powerful new insights into the causes and effects of changes in the law. Despite a long tradition of empirical research by both economists and political scientists into diverse political institutions, investigations of the common law using methods more sophisticated than simply counting cases or votes is a relatively recent development.² Given the natural laboratory provided by the heterogenous development of the common law in the multitude of jurisdictions in the United States, the lack of such research is surprising. Extending this scholarly tradition to common law subjects promises great rewards. Changes in the common law have significant effects on virtually every aspect of modern life. Just in the last fifty years, for example, there have been far-reaching developments in employment law, landlord-tenant law, and tort

1. STEPHEN M. STIGLER, *THE HISTORY OF STATISTICS* 1 (1986).

2. There have been some relatively sophisticated counting exercises, particularly in the area of legal history. See, e.g., Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978) (utilizing sophisticated statistical and data analysis techniques to support his thesis). An exception to this lack is the political science literature on diffusion of judicial innovations. See, e.g., Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981). Among the few articles examining the speed of legal changes empirically using the states as a laboratory are JAMES A. DERTOUZOS & LYNN A. KAROLY, *LABOR MARKET RESPONSES TO EMPLOYER LIABILITY* (Rand Corporation Institute for Civil Justice Paper R-3989-ICJ, 1992); Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969 (1979); and Christopher Curran, *The Spread of the Comparative Negligence Rule in the United States*, 12 INT'L REV. OF L. & ECON. 317 (1992).

law. Evaluations of the effects of these changes would provide valuable information to legislatures and courts considering such changes. Even greater benefits are possible for the development of the economic analysis of law, where empirical work on the common law has lagged far behind theoretical work.

The difficulty of accurately dating changes in the common law partly explains the absence of research into their causes and consequences. Unlike statutes, common law changes are often unannounced or hidden beneath layers of obscure language. Although courts sometimes do make an explicit innovation,³ in many instances courts characterize the change simply as the application of existing precedent to slightly different factual circumstances.⁴ The many sources of the common law introduce further complications. Not only may a decision come from different levels of a state's courts, but federal courts may decide questions of state law prior to the state courts in some circumstances.⁵ Finally, the development of the common law is an iterative process. Courts may change their interpretation of existing precedent or explicitly overrule it. What appears to be one rule may turn out years later to be an entirely different rule.⁶

3. See, e.g., *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) ("We therefore adopt the public policy exception [to the employment-at-will rule] . . .").

4. In *M.B.M. Co. v. Counce*, 596 S.W.2d 681 (Ark. 1980), for example, the Arkansas Supreme Court found no wrongful discharge claim on the facts before it but nevertheless indicated that different facts might lead it to recognize a public policy exception to the employment-at-will rule. I count *Counce* as adopting a public policy exception because I view it as creating a strong presumption that such an exception would be created. (I have found no cases where a court made a statement like the one in *Counce* and later rejected a claim on the grounds that the exception did not exist.) See *infra* Appendix B for additional discussion of *Counce*. The choice of which opinion should be viewed as the innovation will depend, in part, on the effect which is being studied. If the study is concerned with when a particular jurisdiction has become committed to a particular legal doctrine, then a decision adopting the new rule with certainty may be the appropriate choice. On the other hand, if the issue is when the old rule was no longer certain to apply, then a different opinion, perhaps suggesting in dicta that the court was considering changes, might be appropriate. See, e.g., *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987) (adopting the implied contract exception to employment-at-will and portraying the decision as merely an application of existing law rather than as a change in the law). See the dissenting opinion of Justice Maddox for an explanation of how the decision really constituted a change from previous Alabama employment law cases. *Id.* at 740-52 (Maddox, J., dissenting).

5. See *infra* part II.B.2 (discussing this issue). Again, the question of what is being measured may help resolve the issue of which opinion to count.

6. Two important examples of such changes are the implied covenants of good faith and fair dealing in employment contracts in New Hampshire and California. The New Hampshire Supreme Court radically rewrote what had been one of the broadest opinions

Social science research on common law issues has suffered from three difficulties:

- inconsistent treatment of opinions;
- incomplete analysis of changes in the law; and
- hidden choices which affect results.

In this Article, I attempt to delineate and resolve various methodological problems that can critically affect research conclusions in this area.

In Part II, I develop eighteen general principles to guide researchers in solving the problem of dating changes. Although there are no simple answers which resolve every problem, researchers' application of these principles will ensure that their decisions about dating changes are appropriate to the problem studied and, just as important, are open to scholarly review.

In Part III, I present my own analysis of the impact of the modern law of wrongful discharge⁷ and reanalyze two recent empirical papers by economists which analyzed the impact of the modern common law development of wrongful discharge claims in the United States.⁸ This Part not only provides a clear example of the application of the general principles but demonstrates how different choices can affect the results of empirical research.

on the subject, *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), while claiming it had not. *See Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980); *see also* *Bergeron v. Travelers Ins. Co.*, 480 A.2d 42 (N.H. 1984); *infra* note 81. Similarly, the California Supreme Court substantially changed the law with regard to the damages available for breach of the covenant from the remedy which the intermediate appellate court had provided in *Cleary v. American Airlines Inc.*, 111 Cal. App. 3d 443 (Cal. Ct. App. 1980). *See Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (rejecting *Cleary* and holding that only contract damages can be sought for a breach of the implied covenant of good faith and fair dealing).

The iterative nature of the common law process led Landes and Posner to reject the idea of measuring change from a particular decision. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). George Priest has also recently argued against dating change by traditional common law legal methods, suggesting use of settlement ratios as a more accurate measure of change. George L. Priest, *Measuring Legal Change*, 3 J. OF L., ECON. & ORG. 193, 222 (1987).

7. The development of common law remedies for wrongful discharge provides an ideal set of circumstances for the development of these principles. Not only are there three independent datings of the changes, but the rapidity and widespread nature of the changes mean that the case law illustrates almost every problem researchers are likely to encounter.

8. *See DERTOUZOS & KAROLY*, *supra* note 2; Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991).

The results are both reassuring and a cause for concern. They are reassuring because they suggest that conclusions are not "too" sensitive to debatable methodological choices. Point estimates change, often substantially, but wholesale reversals of conclusions do not occur. The concern stems from the sensitivity of empirical results to the dating method used. Unless researchers use systematic judgments informed by legal reasoning in addition to empirical skill, they are in danger of making critical errors. Although caution is advisable in generalizing from the limited number of empirical examples which space permits here, the results of the case studies are encouraging. They suggest that such studies are reliable if done properly. More importantly, the principles developed here provide researchers with a clear framework for approaching these important choices.

II. METHODOLOGICAL ANALYSIS

Empirical research into the common law has three requirements: (1) the definition of common law events; (2) the choice of a method of dating common law events; and (3) the choice of a structure of analysis. To discuss these issues at a general level requires a considerable degree of abstraction. I will attempt to resolve the tension between generality and specificity by discussing issues generically, with appropriate examples from the employment-at-will area. Some conventions are useful: (1) "Rule X" refers to the rule whose adoption or impact is being studied;⁹ (2) "Rule \bar{X} " refers to the adoption of a rule inconsistent with Rule X;¹⁰ (3) "Rule Y" refers to the adoption of a rule not inconsistent with Rule X;¹¹ and (4) "Rule Q" refers to one of the other rules of the legal system which have an impact on the court's consideration of a particular case.¹²

9. In the at-will case, Rule X might be the initial adoption of the at-will rule or the adoption of a particular modern exception to the at-will rule.

10. The New Hampshire experience with *Monge* and *Dorr*, see *supra* note 6, furnishes a good example of this. *Dorr*'s rule (Rule \bar{X}) was inconsistent with *Monge* (Rule X) although not all cases are decided differently under them. See *supra* note 6 and *infra* note 81. Rule \bar{X} could also represent a rejection of an exception entirely where Rule X is adoption of the exception.

11. Where Rule X represents a public policy exception, Rule Y might be an implied contract exception.

12. Rule Q might be, for example, the rule that a party must preserve its objection to language in the court's instructions to a jury by noting it at the time. See, e.g., FED. R. CIV. P. 51 (detailing the procedure that must be followed when counsel objects to jury

A. Definition of Common Law Events

Defining common law events is much more difficult than defining legislative events. I first examine a systematic attempt by federal courts applying habeas corpus law to define what is a "new rule."¹³ It is useful to consider the difficulties the courts have encountered in defining what constitutes a new rule and applying that definition. I then discuss the factors which need to be considered in empirical work.

1. The Jurisprudence of "New Rules"

The Supreme Court has on a number of occasions interpreted the federal Constitution to require states to take (or refrain from taking) certain actions in obtaining criminal convictions. Any rule clearly applies to state court criminal proceedings which begin after the rule is announced. When the state conviction has become final before the rule is announced, however, the applicability of the precedent has been less clear.¹⁴ In *Teague v. Lane*, the Supreme Court held that if the rule is a "new" rule it is not available as a source of law for collateral attacks on convictions finalized before the rule is announced, while if the rule is not "new" it is available for use in collateral proceedings concerning convictions final before the rule is announced.¹⁵ The application of this distinction has proven difficult, however. The fractured nature of the Supreme

instructions). A plaintiff in a wrongful discharge case who contends on appeal that the trial court incorrectly described the legal parameters of a wrongful discharge claim to the jury could be barred from pursuing this objection if he did not adequately note his objection at the time the instructions were given. An appellate court might therefore not reach the question of whether a new exception to the at-will rule applied, since the issue was not properly before it.

13. Courts also consider the newness of rules in determining whether they apply retroactively. See, e.g., *Bergeron v. Travelers Ins. Co.*, 480 A.2d 42 (N.H. 1984) (applying *Dorr* result retroactively). The retroactivity cases are neither more enlightening nor noticeably more doctrinally coherent with regard to defining newness than the habeas cases and so they are not discussed here.

14. In other words, any rule announced at time t clearly applies to state court criminal proceedings which begin at time $t_1 > t$. When the state conviction has become final at $t_0 < t$, the applicability of the precedent announced at time t has been less clear.

15. *Teague v. Lane*, 489 U.S. 288, 300-11 (1989). This section is *not* an attempt to state with completeness the *Teague* doctrine. (Two significant omissions are the exceptions to *Teague* and the pre-*Teague* law on retroactivity in habeas cases). This section is an attempt to draw from this area of the law guidance for social science research. For one of the many doctrinal discussions of *Teague*, see Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183.

Court's opinions and the Court's shifting voting patterns¹⁶ reveal the difficulty of determining a rule's newness.

In *Teague* and its progeny, the members of the Supreme Court have articulated three somewhat different tests for newness. All three depend on the specificity of the statement of the rule—the more specific the statement, the more likely the rule is to be classified as “new.” The starting point of the “newness” jurisprudence is the description by the four-justice *Teague* plurality:¹⁷

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.¹⁸

In the first Supreme Court case applying the *Teague* plurality test, *Penry v. Lynaugh*,¹⁹ a majority labelled one rule (the moral culpability rule)²⁰ as new,²¹ but another rule (the mitigation rule)²² as not new.²³ Dissenting on the latter, Justice Scalia argued that a “new rule, must include not only a new rule that replaces an old one, but a new rule that replaces palpable uncertainty as to what the rule might be.”²⁴

Teague and *Penry*, as a majority of the sharply divided *en banc* Fifth Circuit observed, “do not immediately yield a clearly articulable definition of a ‘new rule.’”²⁵ “[D]ictated by precedent” is simply not a useful way to categorize cases for either habeas review or social science. Given enough generality, precedent may appear to dictate most rules; given sufficient particularity, the same

16. See *infra* Appendix A for a table of Supreme Court voting patterns on *Teague* and its progeny.

17. Joining the plurality decision were Justices O'Connor, Scalia, Kennedy, and Chief Justice Rehnquist.

18. *Teague*, 489 U.S. at 301 (emphasis in original).

19. 492 U.S. 302 (1989).

20. According to the moral culpability rule, the Eighth Amendment prohibits the execution of mentally retarded persons because they “do not possess the level of moral culpability to justify imposing the death sentence.” *Id.* at 328-29.

21. *Id.* at 329.

22. The mitigation rule requires that juries must, upon request, be given jury instructions that make it possible for them to give effect to mitigating evidence in determining whether the death penalty should be imposed. *Id.* at 318-19.

23. *Id.* at 315.

24. *Penry v. Lynaugh*, 492 U.S. 302, 352 (1989) (Scalia, J., dissenting).

25. *Sawyer v. Butler*, 881 F.2d 1273, 1288 (5th Cir. 1989) (*en banc*), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990).

rules are innovations. As the Fifth Circuit majority argued, the *Teague* analysis is inextricably bound up with the question of the substance of the rule in question itself.²⁶

Not surprisingly, the Supreme Court returned to the question the following term. Beginning with the obvious, the majority in *Butler v. McKellar*²⁷ noted that, aside from the simple case of an explicit overruling of a past holding, "where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult."²⁸ The petitioner, Butler, argued that *Arizona v. Roberson*²⁹ (the holding of which he sought to have applied to his case) had not articulated a new rule but was merely the application of an earlier opinion (*Edwards v. Arizona*)³⁰ to slightly different facts.³¹ In support of his claim, Butler noted that the majority opinion in *Roberson* had (1) stated that the case was directly controlled by *Edwards* and (2) rejected a request by the state for an "exception" to the rule announced in *Ed-*

26. *Id.* at 1281. The *en banc* dissenters argued that the *Teague* plurality and *Penry* majority recognized that

the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not "new." To define "new" rules more broadly would depart significantly from the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.

Id. at 1297 (King, J., dissenting) (citations omitted). The *Teague* plurality had cited the holding of *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), that the Eighth Amendment forbids execution of insane prisoners as an example of a "new rule" without explanation. *Teague v. Lane*, 489 U.S. 288, 301 (1989). Attempting to explain this example, the dissenters in *Sawyer* argued that the example was of a "new" rule

because of its sweeping and categorical nature, even though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn such punishment. The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

Sawyer, 881 F.2d at 1302 (citations omitted).

27. 494 U.S. 407 (1990).

28. *Id.* at 412-13.

29. 486 U.S. 675, 677-78 (1988) (holding that the Fifth Amendment bars repeated interrogation even for separate investigations after the right to counsel has been invoked).

30. 451 U.S. 477, 484 (1981) (holding that the police must refrain from further questioning of suspects in continuous custody once the suspect has invoked his right to counsel).

31. *Butler*, 494 U.S. at 414.

wards.³² As a result, petitioner concluded that *Roberson* was within the "logical compass" of *Edwards*.³³ The majority rejected this argument, and the notion that a court's statement that it is not announcing a new rule is conclusive, finding instead:

[T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. . . . That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously.^[34] It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*.³⁵

On the same day *Butler* was decided, the Supreme Court also applied *Teague*'s analysis in *Saffle v. Parks*.³⁶ *Saffle* produced a "functional" view of *Teague* under which the courts' task became "to determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution."³⁷ This formulation has proven to be the most useful of the Court's tests and appears to be the key to the future application of the doctrine.³⁸

The Supreme Court expanded on *Saffle* in *Sawyer v. Smith*.³⁹ In *Sawyer*, a prisoner sought to apply the holding of *Caldwell v.*

32. *Id.*

33. *Id.* at 415 (quoting transcript of oral argument).

34. The Seventh Circuit in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987), and the lower court in *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988) (subsequent history omitted), had reached opposite conclusions on the issue in the case before the court.

35. *Butler*, 494 U.S. at 415. One remarkable aspect of this analysis is that the "court" whose characterization is being rejected is the Supreme Court itself.

36. 494 U.S. 484 (1990).

37. *Id.* at 488.

38. See *Graham v. Collins*, 113 S. Ct. 892, 897 (1993) (citing the *Saffle* formulation).

39. 497 U.S. 227 (1990).

*Mississippi*⁴⁰ to his case. *Caldwell* created the "responsibility rule" which prohibited the imposition of a death sentence "by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere."⁴¹

In *Sawyer*'s state criminal trial the prosecution had emphasized to the jury that there would be extensive review of their decision.⁴² The prosecutor used this review to argue that the jury should not hesitate to sentence *Sawyer* to death.⁴³ To apply the *Teague* test, the Court reached for the purpose of the distinction: "[t]he principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not used later to upset the finality of state convictions valid when entered."⁴⁴ The goal, therefore, is to separate cases in which the law has evolved past the point at which "reasonable" judges would no longer agree from those cases which simply apply existing principles in a consistent fashion to slightly different facts.

The *Sawyer* majority found the responsibility rule was a new rule and looked to several factors to make that determination.⁴⁵ First, the Court found that framing the responsibility rule as a general principle "of reliability in capital sentencing [would make] the test meaningless if applied at this level of generality."⁴⁶ Second, the Court noted that no prior case had applied the responsibility rule to prosecutorial argument rather than to a statutory scheme.⁴⁷ Third, the case which announced the rule contained a dissent which argued that there was a "lack of authority" for the approach taken.⁴⁸ Fourth, the majority argued that there were indications that the rule was in fact the opposite of the responsibility rule announced before the Court issued the decision.⁴⁹ Finally, the majority rejected the argument that the issuance of state court opinions adopting similar rules was sufficient to establish the rule, since those opinions applied state law rather than federal constitu-

40. 472 U.S. 320 (1985).

41. *Sawyer*, 497 U.S. at 233.

42. *Id.* at 231.

43. *Id.* at 230-32.

44. *Id.* at 234.

45. *Id.*

46. *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

47. *Id.*

48. *Id.*

49. *Id.* at 237 (explaining that such an argument was permissible.)

tional law.⁵⁰

In the Court's next attempt to apply the *Teague* standard, *Wright v. West*,⁵¹ consensus on the meaning of "newness" continued to elude the Court. Justices Thomas and Scalia and the Chief Justice interpreted *Teague* as addressing the question of whether the state courts have "interpreted old precedents *reasonably*, not only [whether] they have done so 'properly.'"⁵² Justices O'Connor, Blackmun and Stevens argued:

To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. Even though we have characterized the new rule inquiry as whether "reasonable jurists" could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is "objective," and the mere existence of conflicting authority does not necessarily mean a rule is new. If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.⁵³

Justice Souter offered a third test:

The crux of the analysis when *Teague* is invoked, then, is identification of the rule on which the claim for habeas relief depends. To survive *Teague*, it must be "old" enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held to be unlawful. A rule old enough for *Teague* may of course be too general, and while identifying the required age of the rule of relief is a simple matter of comparing dates, passing on its requisite specificity calls

50. *Id.* at 239. Justices Marshall, Brennan, Blackmun, and Stevens dissented, arguing the rule was not a new rule. Their primary argument was that this rule was simply the application of an existing principle to a different set of circumstances. *Id.* at 246-47 (Marshall, J., dissenting).

51. 112 S. Ct. 2482 (1992).

52. *Id.* at 2490 n.8.

53. *Id.* at 2497 (O'Connor, J., concurring in judgment) (citations omitted).

for analytical care.⁵⁴

Most recently, the Court applied *Teague* in *Gilmore v. Taylor*.⁵⁵ The petitioner sought review of his conviction on the ground that the jury instructions were improper because their form allowed a jury to convict him of murder "without even considering whether he was entitled to a voluntary manslaughter conviction instead."⁵⁶ The *Teague* issue was the only issue in *Gilmore* because the State had conceded that the instructions were unconstitutional under the *Falconer v. Lane*⁵⁷ standard.⁵⁸ The Court approached the issue this way: "We begin our analysis with the actual flaw found by the *Falconer* court in the challenged jury instructions."⁵⁹ The Court then proceeded by narrowly stating the precise nature of the *Falconer* error (the structure of the jury instructions) and compared that error to the precedent upon which the Seventh Circuit had relied in *Falconer*, *Cupp v. Naughten*.⁶⁰ Finding that *Cupp* was "an unlikely progenitor" of the *Falconer* rule, the Court determined that *Falconer* had established a new rule.⁶¹

The Supreme Court has now provided empirical researchers and habeas petitioners with three not necessarily consistent implementations of the test to determine a rule's newness: (1) the Thomas test: would it have been unreasonable to reach a result before the rule was announced; (2) the O'Connor test: an "objective" test as to the reasonableness of any distinction between an existing rule and new factual circumstances; and (3) the Souter test: a rule must be based on a "specific" prior rule not to be a new rule. What is clear from *Teague* and its progeny is that the application of the test for newness depends critically on the specificity of the statement of the rule. Where, as in *Gilmore*, the rule in question can be stated narrowly, it is new. Where, as in the case of the mitigation rule in *Penry*, the rule is stated more broadly, it is not new.

Although this discussion suggests that the Supreme Court has been unsuccessful in defining "new rule" even in a single area of

54. *Id.* at 2501 (Souter, J., concurring in judgment).

55. 113 S. Ct. 2112 (1993).

56. *Id.* at 2116.

57. *Falconer v. Lane*, 905 F.2d 1129, 1130 (7th Cir. 1990) (holding that jury instructions which set forth the elements of murder before the elements of voluntary manslaughter violate due process).

58. *Gilmore*, 113 S. Ct. at 2116.

59. *Id.*

60. 414 U.S. 141 (1973).

61. *Gilmore*, 113 S. Ct. at 2117.

constitutional analysis so that other courts or researchers can consistently apply the definition,⁶² we can draw some useful lessons from these opinions. First, the criterion that defines a "new rule" cannot consist of the announcing courts' own assessment of "newness," either in contemporaneous opinions or *ex post*. Independent analysis must determine "newness." Second, the test of newness is, as the Fifth Circuit noted, inextricably bound up with the definition of the rule. Defining a new rule requires a comparison with an "old" rule. In some cases, particularly in constitutional law, there are wholly "new" requirements based on, at least arguably, pre-existing principles. In other cases, however, the question is much more difficult. Third, the multiplicity of opinions in this area offers a wide menu of indicators that a researcher can use to identify "new" rules. The choice of indicators must, however, be justified a priori on theoretical principles in each case, and cases where a different choice might have produced different results must be identified. Finally, the definition of a principle for identifying "new rules" is a difficult endeavor.

2. Analysis

As is clear from the above discussion, before we can decide how to evaluate a case we must first define the event with which we are concerned. To do so, we need to look first at the raw material the courts produce for our analysis: written opinions deciding particular cases.⁶³ Within an opinion, a court typically presents a selective summary of the facts of the case, a statement of legal rule(s), and application(s) of the rule(s) to the facts presented, leading to an order requiring the parties or a lower court to take some action⁶⁴ or a refusal to order such an action.⁶⁵ The primary function of these opinions in the legal system is to resolve a par-

62. For a thorough evaluation of the application of *Teague* in the lower courts, see generally Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991).

63. Trial courts sometimes produce written opinions, but they also generate products such as jury verdicts, injunctions, temporary restraining orders, and other types of orders denying or granting various requests of the parties. Some of these are supported by opinions, but many are not.

64. For example, the lower court may be ordered to dismiss the action, retry the action, take further proceedings "not inconsistent with this opinion," or some other action. In some cases, of course, the court can resolve the entire case without further proceedings and so simply directs the lower court to enter judgment.

65. For example, the court may affirm the lower courts decision.

ticular dispute between the parties. A secondary function is to create a body of precedent to which other courts, lawyers, and the public can refer to prevent future disputes or to resolve disputes without resort to the courts.⁶⁶ The court's actions in furthering its primary function often frustrates this secondary function.

For example, there is a well-known principle which restricts a court to deciding the actual controversy before it and refraining from generalization to other potential fact patterns.⁶⁷ This principle is often honored in the breach, but it still prevents courts in many instances from simply stating: "The rule from now on is to be Rule X, although because the party seeking to establish Rule X has failed to properly preserve its objections to the action of the trial court below, Rule Q governs this case and that party loses." Instead, a court is more likely to say: "Although under other circumstances we might be inclined to apply Rule X, the party seeking Rule X loses in this case because its failure to follow Rule Q prevents us from reaching the issue of whether Rule X applies."⁶⁸ The result is that the presentation to a court of the question of whether Rule X applies can produce a significant range of legal outcomes, which are listed in Table 1. The statements of each of these can, of course, be made with differing degrees of certainty and by varying numbers of members of the court. The court may equivocate in making its suggestion,⁶⁹ bury the discussion in a

66. For an extensive discussion and empirical examination of the dual role of precedent, see Landes & Posner, *supra* note 6.

67. See U.S. CONST. art. III, § 2; see also, e.g. *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 785 (9th Cir. 1979).

68. See, e.g., *Atchison, T. & S.F.R. Co. v. Andrews*, 211 F.2d 264, 266 (10th Cir. 1954) (clearly signalling the Tenth Circuit's view that the contract was terminable at-will but noting that "it is a firmly established rule that ordinary errors in instructions are not open to review on appeal unless the matter was brought to the attention of the trial court by exception to the instructions or in some other appropriate manner"); *Hodges v. Gibson Prod. Co.*, 811 P.2d 151 (Utah 1991) (noting that the failure of defendant to properly object to the instruction on a public policy exception precludes appellate consideration of whether the exception existed).

69. Compare *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) ("We join the growing majority of jurisdictions and recognize a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy.") with *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 683 (Ark. 1980). In *Counce*, the court's discussion went as follows:

Ms. Counce first argues that there was a breach of the employment relationship in violation of public policy. This is but another way of saying that M.B.M. breached the contract of employment. She relies to some extent upon cases holding that discharge of an employee for filing a worker's compensation claim, for refusing to 'go out' with her foreman, for going on jury duty, or for refus-

footnote, or simply be cryptic regarding the applicability of Rule X.⁷⁰ Similarly, all members of a multimember court may agree, for example, that Rule Q applies and governs the disposition of the case, but a minority may quarrel with the majority's discussion (or lack thereof) of the issue concerning Rule X.⁷¹

al to commit perjury, is a breach of contract. She contends that, upon the authority of such cases, she has stated a cause of action in contract. We might well agree with Ms. Counce if there was any indication that she was discharged for exercising a statutory right, or for performing a duty required of her by law, or that the reason for the discharge was in violation of some other well established public policy. That simply is not the case here.

70. *See, e.g.,* *High v. Sperry Corp.*, 581 F. Supp. 1246, 1248 (S.D. Iowa 1984) ("The terms of the employment relationship between plaintiff and defendant are not before the court. Perhaps plaintiff can prove an employment relationship and other facts giving rise under Iowa common law to a cause of action for breach of an implied covenant of good faith and fair dealing.").

71. *See, e.g.,* *Morriss v. Coleman Co.*, 738 P.2d 841, 851-52 (Kan. 1987) (Herd, J., concurring) (arguing for an expansion of the cause of action); *Johnson v. Kreiser's Inc.*, 433 N.W.2d 225, 228 (S.D. 1988) (Sabers, J., specially concurring) (arguing for an extension of the holding); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 183-84 (W. Va. 1980) (Neeley, J., dissenting) (objecting to the creation of the exception).

Table 1 Legal Outcomes of Court Decisions

Case	Legal Outcome
I	Rule X applies ^a
II	Rule X does not apply ^b
III	Rule X might apply to this type of case but does not on these facts ^c
IV	Rule X might apply to this type of case, but Rule Q prevents consideration of that question ^d
V	The issue of the applicability of Rule X has been raised by the parties, but Rule Q prevents consideration of that question ^e
VI	Rule Q applies ^f
VII	Rule \bar{X} applies ^g

^a *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

^b *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987).

^c *M.B.M. Co. v. Counce*, 596 S.W.2d 681 (Ark. 1980).

^d *High v. Sperry*, 581 F. Supp. 1246 (S.D. Iowa 1984).

^e *Tombello v. Dunn*, 342 N.W.2d 23 (S.D. 1984).

^f *Bottijliso v. Hutchinson Fruit Co.*, 635 P.2d 992 (N.M. App. 1981).

^g *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980) (reinterpreting *Monge*).
(Most cases discussed in detail in Appendix B.)

Even when the subject of the research is court adoption of a rule,⁷² as in the Dertouzos and Karoly study of modern exceptions to the at-will rule,⁷³ the definition of the event is not straightforward. Between Case I and Case II lies a wide range of language indicating different amounts of judicial sympathy for a legal innovation. Even Case I may be stated in language which severely limits the general application of the rule.⁷⁴

72. Empirical research related to the common law is not limited to the question of whether a particular rule has been adopted. The replacement of certainty concerning legal rules with uncertainty may be the event of interest: in the at-will case, my analysis in Part III relied on this formulation. If so, then Case I and Case III may be of equal interest to the researcher.

73. See DERTOUZOS & KAROLY, *supra* note 2, at 5-7.

74. In an interesting series of cases in the late 1970s, the Alabama Supreme Court considered claims by employees of the American Cast Iron Pipe Company ("ACIPCO") against the company. *Duff v. American Cast Iron Pipe Co.*, 362 So. 2d 886 (Ala. 1976); *Smith v. American Cast Iron Pipe Co.*, 370 So. 2d 283 (Ala. 1979); *Bierley v. American Cast Iron Pipe Co.*, 374 So. 2d 1341 (Ala. 1979); *Green v. American Cast Iron Pipe Co.*,

The underlying theory of how the legal event is thought to influence the parties whose behavior is of primary interest will heavily influence the definition of the legal event. If we are concerned with the behavior of businesses, for example, then the creation of significant legal uncertainty concerning the future rule in similar cases will be likely to produce behavioral changes even without the occurrence of Case I. If we are concerned about the influence of an innovation in tort law on individuals' behavior, a quite different analysis would be necessary. If we are concerned with the behavior of other judges, as in the Dertouzos and Karoly analysis of the adoption of exceptions, the existence of Case I may be critical. This discussion points to the first principle for empirical analysis of common law events:

PRINCIPLE 1: The researcher must justify *a priori* on theoretical grounds the definition of the common law event to be measured before she can perform the actual measurement.

More formally, one might adopt either of two alternative views of common law decisions. First, one might view the change in the law as an unobserved event, which is observed only when certain other events occur.⁷⁵ Alternatively, one might consider the change

446 So. 2d 16 (Ala. 1984); *Farlow v. Adams*, 474 So. 2d 53, 56-57 (Ala. 1985). In *Smith and Duff*, the court found that there was a contractual right not to be discharged except for violation of a plant rule, and hence the at-will rule was inapplicable. *Farlow*, 474 So. 2d at 56-57. Rather than so ruling on broad implied contract grounds, however, the "unique corporate structure" of the employer provided a narrow basis for relief. *Id.* at 56. ACIPCO was governed by a trust established by the will of its founder, which provided, among other things, that the trustees who managed the company "acknowledge our belief in Jesus Christ, and the practical application of His teachings to industrial problems and progress." *Id.* at 56 n.2.

75. This, of course, is the familiar unobserved variable problem in econometrics and is specified as:

$$y^* = y + \epsilon$$

One would specify any analysis under this assumption as:

$$Y^* = f(X'B) + \mu$$

in the law to be directly observed.⁷⁶ The difference is more than a matter of terminology. In the first case, the search will seek evidence of a shift in the underlying law in cases. In the second case, the search will seek the discovery of an opinion finalizing the shift and more conclusive language in the opinion is likely to be necessary.⁷⁷ If the analysis is concerned with the behavior of other parties, the theoretical analysis should specify (1) the path through which common law court decisions are thought to influence the actors of interest; and (2) the type of legal events which are thought to produce this influence. If the analysis is concerned with the behavior of the court system itself, the theoretical analysis should explain how court opinions have defined the event: is mere recognition of a rule's existence enough or is a clear endorsement of the rule necessary?

Beyond this discussion, as required by modern legal analysis, lies a meta-discussion concerning the content of Rule X and how we differentiate Rule X from Rule \bar{X} . This is not simply a theoretical matter but one with far-reaching practical consequences. Courts do not simply announce Rule X—their language is both richer and more equivocal. As we saw above with respect to the *Teague* cases, the Supreme Court has been unable to resolve satisfactorily this issue in its habeas jurisprudence.

Even when they do take steps toward a new rule, courts may not fully specify all aspects of the rule until much later. They may allow a new cause of action to proceed to trial, but leave the measure of damages for another day. They may decide that a remedy exists in principle, but may be unwilling to determine its parameters until the record has been developed further.⁷⁸ Depending on the characteristic of the rule which matters, this gradual delineation

76. The specification would then be:

$$Y = f(X'B) + \mu$$

77. In Iowa, for example, the Iowa Supreme Court suggested the possibility of a public policy exception to the at-will rule in *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 456 (Iowa 1978), and again in *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 196 (Iowa 1985), before conclusively adopting the exception in *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988). See also *infra* notes 143-45 and accompanying text.

78. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (Conn. 1980) (adopting public policy exception but declining to decide whether "violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy").

of the law may alter our judgment about when the rule was created.⁷⁹

Even if the language is unequivocal and definitive, problems still arise when making comparisons between cases. Leaving aside the issue of whether there is a text that contains shared meaning at all,⁸⁰ since an empirical analysis presumes the existence of such a text, we must decide how to compare the language used by the courts of one state in different opinions⁸¹ to the language used by courts of different states. This leads to the second principle:

PRINCIPLE 2: Researchers must define precisely the legal

79. For example, the potential for punitive damages might be the characteristic of interest, rather than the existence of a particular claim allowing only compensatory damages. Consequently, we might agree that the rule was created when the court conclusively decided on the issue of punitive damages.

80. See, e.g., Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

81. The reinterpretation by the New Hampshire Supreme Court of its opinion in *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), illustrates this problem. In 1980 the New Hampshire Supreme Court backed away from a broad reading of *Monge*, reinterpreting it as a public policy exception. *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980). The New Hampshire court has held that *Dorr* "clarified and construed" *Monge* and "did not create a new rule of law or significantly depart from *Monge*." *Bergeron v. Travelers Ins. Co.*, 480 A.2d 42 (N.H. 1984).

Other courts have rejected the New Hampshire Supreme Court's interpretation of *Monge*. See *Cummins v. EG&G Sealol, Inc.*, 690 F. Supp. 134, 137 (D. R.I. 1988) (citations omitted) (interpreting *Dorr* as "arguably altering the nature of the action created from one in contract . . . to one in tort"); *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1031-32 n.3 (Ariz. 1985) (noting *Dorr*'s retreat in a footnote but citing *Monge* as an example of the farthest reach of an exception to the at-will rule); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 785 n.16 (Conn. 1984) (noting that "New Hampshire, where the rule was first announced, has since retreated and presently requires that the discharge violate public policy"); *Morris v. Coleman Co., Inc.*, 738 P.2d 841, 849-50 (Kan. 1987) (citing *Monge*, without mentioning *Dorr*, as creating an implied covenant of good faith and fair dealing); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1089 (Miss. 1987) (noting that New Hampshire had adopted the implied covenant of good faith and fair dealing in *Monge* but that in *Dorr* the court "discarded it in favor of a more limited rule"); *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 493 (Mont. 1984); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wis. 1983) (reading *Monge* broadly, without mentioning or citing *Dorr*, for the proposition that employers have a duty to discharge only in good faith).

The narrow reading in *Dorr* is also contrary to the pre-*Dorr* scholarly commentary on *Monge*. See, e.g., Comm. on Labor and Employment Law, Ass'n of the Bar of the City of N.Y., *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE REC. OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. 170, 183 (1981) (interpreting *Monge* as requiring good faith in discharging employees); Cornelius J. Peck, *Some Kind of Hearing for Person Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313, 321 (1979).

rule which affects the analysis.

Compliance with this principle will allow readers to judge whether the analysis rests on a definitional quirk. It is not, for example, sufficient to state simply that Rule X is under study. Rather it is necessary to illustrate the parameters of the rule with examples and careful analysis.

Readers are not the only beneficiaries of compliance with this principle. Researchers too will benefit from careful explication of the *legal* boundaries of the rule they analyze. It is difficult to imagine a successful process other than an iterative one: definition of the rule, followed by legal research, redefinition, additional legal research, and so forth. Some rules are easy to distinguish: State A adopts Rule X and State B adopts Rule \bar{X} ; X and \bar{X} are antithetical as well as inconsistent. Often, however, drawing the distinction between Rule X and Rule \bar{X} is not so straightforward.⁸² There are several potentially distinguishing characteristics: the type of remedy involved,⁸³ the legal doctrine underlying the claim,⁸⁴ or the source of the rule⁸⁵ could all be used. Some justification for the choice needs to be offered, and perhaps alternative specifications attempted.⁸⁶ This leads to a third principle:

PRINCIPLE 3: Researchers should define the legal rule with reference to the underlying theoretical analysis of the effect of the legal change on the court's behavior.

As the discussion above demonstrates, there cannot be a gener-

82. Dertouzos and Karoly define a narrow public policy cause of action, a broad public policy/good faith cause of action, and an implied contract cause of action. They also use a tort/contract distinction in some specifications. See DERTOUZOS & KAROLY, *supra* note 2, at 10. Krueger and I rely on a different tripartite division. See Krueger, *supra* note 8, at 648-50; *infra* notes 205-11 and accompanying text. Other categorizations are no doubt possible as well.

83. See DERTOUZOS & KAROLY, *supra* note 2, at 8-9 (distinguishing between contract and tort remedies).

84. See Krueger, *supra* note 8, at 648-50.

85. A court which has consistently adopted other majority rules identified in the *Restatement of Torts*, for example, is presumably more likely to adopt a majority rule than a minority rule in a torts case where the court has not yet spoken than a court which has more often adopted minority rules in the past.

86. Dertouzos and Karoly, for example, justified the remedy-based approach since tort damages generally exceed contract damages. See, e.g., DERTOUZOS & KAROLY, *supra* note 2, at 8-9. Alternatively, I relied on the doctrinal basis because (i) it has sufficient overlap with the tort/contract remedy to capture much of that distinction and (ii) it more effectively captures, in my opinion, the distinction between disclaimable and nondisclaimable claims.

al answer to the question of what constitutes a common law event for research purposes; the answer for any particular project will depend on the nature of the project. The principles listed provide some guidance to the researcher. The first principle is a caution that appears in other contexts later in this paper: the definition of common law events depends heavily on the context of the question being asked. When researchers examine the question of the influence of common law events, they must be able to specify the channel through which the common law event influences the population being studied. Similarly, scholars must pay attention to the legal details of the opinions in question to determine the range of possible answers. Independently of questions of whether a particular opinion meets the researcher's criteria for inclusion, the researcher must determine the range of outcomes given in Table 1 which will satisfy her needs.⁸⁷ There is simply no substitute for independent legal research to define the common law event. Secondary sources, in particular specialized reporters such as those published by the Bureau of National Affairs, are suitable only as starting points; they cannot reliably define the event. The second principle is that the researcher must be clear about the level of generality at which she is prepared to define the rule. As the disputes in *Teague* and its progeny demonstrate, any event can become a nonevent and vice versa. The third principle is the obverse of the first. Legal analysis alone is insufficient; scholars must also use the social science motivating the analysis to define the event. The *Teague* cases demonstrate that legal analysis alone is incapable of defining all but the most obvious common law events.

B. Case Selection

I turn now to the specifics of dating the changes in the common law. Cases produce opinions at different times in their progress and the procedural and substantive differences between those occasions are responsible for many of the problems with dating changes in the common law. Courts also act at different rates among jurisdictions and among different types of cases. These differences are important to consider in evaluating changes since the relative speeds will affect the rates of adoption of changes.⁸⁸ To

87. The modern erosion of employment-at-will is a fine example of this issue. One can define the event as the adoption of a public policy cause of action, a tort cause of action, or a broad or narrow tort cause of action.

88. There are no nationwide statistics on the processing times of state trial courts.

identify the problem, consider the path a dispute follows through the court system.⁸⁹ Using wrongful discharge law as an example, the development of a common law exception in a particular state⁹⁰ (State Z) takes place, in general,⁹¹ as follows: Employer A fires Employee B. B visits Lawyer L and persuades L to accept his case. L accepts the case, files suit against A, and the case of *B vs. A* enters the legal system. One party prevails at the trial level, either on the merits or for procedural reasons.⁹² This process can take from a few months to several years. In most states the trial court opinions, if any,⁹³ in *B vs. A* are unpublished documents.⁹⁴

There have been several studies which have examined selected state courts. In 1987, for example, the median time for completion of proceedings in contested civil cases in 39 trial courts was 481 days, with individual courts' medians ranging between 180 and 1019 days. JOHN A. GOERDT, REEXAMINING THE PACE OF LITIGATION IN 39 URBAN TRIAL COURTS tbl. 3.1, at 38 (1991). The median length of time varied with the type of case (424 days for contract cases versus 469 days for tort cases) and cases which involved jury trials took significantly longer (median time 748 days). *Id.* tbls. 3.2 & 3.9. No time series data is available on court processing times, but comparison with an earlier study of some of the same courts suggests that the time required increased from 1976 to 1987 in some courts and decreased in others. See THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS tbl. 3.3, at 27 (1978); GOERDT, *supra*, tbl. 3.10, at 57. There are no statistics available for earlier periods for state courts.

The broad range of times indicates a problem for empirical research into when the law changed. If cases are delayed at the trial level, the opportunity for an appellate court to create a new rule is also delayed. Although there is no convenient way to control for this effect, researchers need to be aware of it when interpreting their results. Its importance will vary with the question being studied. With tort law changes in comparative negligence, for example, delays will be less important than in employment-at-will since tort cases appear independent of the rule while wrongful discharge cases were rare before the law began to change.

89. This section relates information which legally trained readers are likely to find elementary. Because I hope non-legally trained social scientists will also find this Article useful, I have opted for completeness rather than assume that all readers are aware of all the steps in creating an opinion.

90. The discussion here assumes that the law of State Z will apply. There are often choice of law questions and a court in State Z will apply State Z's choice of law rules to determine which state's substantive law should apply.

91. In some instances (studies of the rate of change of the law, for example) researchers should control for the relative speeds of different states' legal systems. A small state with no intermediate appellate court (Rhode Island) will not only have fewer opportunities to change the law, since fewer cases will be brought, but will resolve those cases at a different rate than a large state with an intermediate appellate court (California). Data on the speed of state court systems is sparse. Where possible, therefore, the notes include time estimates for various proceedings.

92. The employer may prevail by citing the at-will rule in support of the contention that regardless of the truth of B's factual claims, B has no legal claim.

93. Some trial courts decide motions with simple orders stating: "Defendants' motion to dismiss is granted." Others issue formal opinions supporting their actions. A jury ver-

In many states, the appeal of *B vs. A* begins in an intermediate appellate court,⁹⁵ where, after a typical delay of a year or more,⁹⁶

dict simply takes the form of a judgment entered by the court.

94. Some states, such as New York, sometimes publish trial court decisions. *See, e.g., Chin v. AT&T*, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978), *aff'd*, 70 A.D.2d 791, *appeal dismissed*, 396 N.E.2d 206 (N.Y. 1979) (an important at-will case). Delaware adopted the at-will rule in a trial court opinion, *Greer v. Arlington Mills Mfg. Co.*, 43 A.2d 609 (Del. 1899), and the Delaware Supreme Court did not address the issue until 1982. The first Delaware Supreme Court opinion to address the at-will rule is *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095, 1096-97 (Del. 1982). *Heideck* cites only earlier superior court opinions but clearly indicates the rule had been adopted earlier.

95. Delaware, the District of Columbia, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming currently do not have intermediate appellate courts. *See infra* note 126.

96. Delays have sharply increased in recent years. Although historical data are sparse, there is one early study of federal court delay. In 1928-30, 908 terminated law cases on selected federal district court dockets were examined and the time to termination calculated:

Time	Number	%
< 1 month	267	29.4
1-2 months	106	11.7
2-3 months	103	11.9
3-6 months	113	12.4
6 months - 1 year	111	12.2
1-2 years	102	11.2
2-3 years	68	7.5
3-5 years	25	2.8
≥ 5 years	7	0.8

(Numbers exclude one case which did not have any entry on its docket sheet.) AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Table 79 at 189 (1934). More recently, there were 248,717 civil cases (excluding land condemnation cases) pending in U.S. district courts as of September 30, 1984. Of these, 155,081 (62.4%) were pending for less than one year, 55,204 (22.2%) were pending for one to two years, 21,703 (8.7%) were pending for two to three years, and 16,727 (6.7%) were pending for three years or more. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL ANALYSIS AND REPORTS DIV., FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE 12-MONTH PERIOD ENDED SEPTEMBER 30, 1984, tbl. C6.A, at A-20 (1984). These national figures obscure important differences among courts—the three years and over figure varied from 19% in District of Massachusetts to 0.7% in the Eastern District of Tennessee. *Id.* Decisions on motions are also subject to delays. As of September 30, 1984, there were 1628 cases and motions held under advisement over 60 days, 978 more than 60 days and less than six months, 411 between six months and one year, and 239 over one year. *Id.* tbl. II, at 17.

For the 12 months ending June 30, 1989, the following table presents the median times to disposition for the 64,869 diversity cases (of 194,759 total civil cases) terminated during the time period.

Type of Diversity Case	Time to Disposition (Months)				
	10% less than	Median	10% more than	Number	%
All cases	2	9	31	64,869	100
Closed without court action	2	8	30	19,441	30
Closed before pretrial	1	6	25	27,928	43
Closed during or after period	6	15	36	13,086	20
Closed after or during trial	7	18	40	4,414	7

Source: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TWELVE MONTH PERIOD ENDING JUNE 30, 1989, Appendix 1, Table CSA.

There is also some sketchy historical data on time to decision in state cases in the late 19th century.

State	Avg. Case Length (mos.)	State	Avg. Case Length (mos.)	State	Avg. Case Length (mos.)
Alabama	18-24	Louisiana	10-12	North Carolina	18-24
Connecticut	12-36	Maine	18	Ohio	36-48
D.C.	72	Maryland	12-18	Pennsylvania	24-36
Delaware	30	Massachusetts	6-24	South Carolina	12-36
Florida	12-36	Michigan	15-30	Tennessee	48
Georgia	48	Minnesota	12	Texas	24
Illinois	36	Missouri	36	West Virginia	30
Indiana	24	Nebraska	24-60	Wisconsin	18
Iowa	24	New York	60		
Kentucky	36	New Hampshire	18		

Source: AMERICAN BAR ASSOCIATION REPORT OF THE SPECIAL COMMITTEE APPOINTED TO CONSIDER AND REPORT WHETHER THE PRESENT DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION CAN BE LESSENED, AND IF SO, BY WHAT MEANS, IN REPORT OF THE EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION (1885) at 368-449.

Although there is no comprehensive data on delays, there are some studies which indicate state courts continue to experience substantial variations in case processing times:

a panel⁹⁷ of that court issues an opinion, often widely available although not necessarily formally published in a case reporter. If B (or A) is dissatisfied with the results and has the resources to pay L (or his defense counterpart) additional costs and fees, the case may proceed to additional appellate review—either an *en banc* sitting of the intermediate appellate court or the State Z Supreme Court. After further delay,⁹⁸ the court may decide to grant review or not. If the court grants review, additional delay ensues before it issues an opinion.⁹⁹ Again the court may or may not formally publish the opinion,¹⁰⁰ although an opinion adopting an exception to the at-will rule is sufficiently important to warrant publication in most cases.¹⁰¹ Opinion in hand, A and B most likely depart for the lower courts for, in the oft-used judicial phrase, “further proceedings not inconsistent with this opinion.”¹⁰² As the court has issued an opinion, we can allow A and B to litigate in peace and examine the consequences of the decision.

A and B might have taken a slightly different route to court. If

Court	All Civil Cases			
	Median length (days)	90th %tile (days)	% over 1 year	% over 2 years
All courts	417	1038	51.0	21.7
Fastest	177	526	2.3	5.0
Slowest	818	1708	71.0	54.0

Source: GOERDT, *supra* note 88, at 39, Table 3.2.

97. Panels consist of less than the full membership of the court.

98. No statistics are available on the extent of this delay.

99. No statistics are available on the extent of this delay.

100. The number of opinions issued by state supreme courts varies widely across states. In 1989, for example, the number ranged from 65 in Delaware to 751 in Alabama. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989 94-98 (1991). This difference partially reflects differences in counting methods. *Id.* at 4.

101. The publication history of the opinions in *Wagenseller v. Scottsdale Mem. Hosp.*, 714 P.2d 412 (Ariz. Ct. App. 1984), *aff'd in part, rev'd in part, remanded, and vacated*, 710 P.2d 1025 (Ariz. 1985), illustrates this point: the appellate court opinion, which had denied a public policy claim, was issued on June 21, 1984, but not published until after the Arizona Supreme Court opinion, which allowed the claim, was issued on June 17, 1985.

102. If A prevailed before determination on the merits, the case may return for trial, although in unusual cases the Supreme Court might be able to render a judgment based upon agreed facts. If B prevailed, the case may return for additional proceedings on damages, attorneys' fees, and the like, or for a new trial for other reasons.

diversity jurisdiction¹⁰³ existed or if the wrongful discharge claim was attached to other claims under federal law,¹⁰⁴ *B vs. A* might begin in federal district court.¹⁰⁵ Despite its location in a federal court, the wrongful discharge claim would still be interpreted under State Z's law and the federal court would have two options in deciding the case. First, the court could make an "*Erie* guess" as to the law of State Z.¹⁰⁶ In doing so, the federal court would perform much the same analysis as a state trial or intermediate appellate court and examine the decisions of state courts in State Z.¹⁰⁷ Although the role of the federal court would be to anticipate the developments in State Z's law, not to innovate independently, federal judges are not to be merely "ventriloquists' dummies."¹⁰⁸ Instead the federal court is to function

as a proxy for the entire state court system, and therefore must apply the law that it conscientiously believes would have been applied in the state court system, which includes the state appellate tribunals. In other words, the federal court must determine issues of state law as it believes the highest court of the state would determine them, not neces-

103. 28 U.S. § 1332 (1988); see also *infra*, part II.B.2.

104. 28 U.S.C. § 1367 (Supp. 1990). Obvious examples for a wrongful discharge case would be Title VII, Americans With Disabilities Act, or Age Discrimination In Employment Act claims alleging discrimination in discharge with a pendent state claim for discharge violating public policy. See, e.g., *Fletcher v. Wesley Medical Ctr.*, 585 F. Supp. 1260 (D. Kan. 1984) (combining federal Age Discrimination in Employment Act claim with pendent state claim).

105. Alternatively, *B vs. A* could begin in state court and be removed to federal court under the removal statute. 28 U.S.C. § 1441 (1990). Removal use has varied over time. A study of selected federal district courts between 1928 and 1930 found that 10% of all actions on the law docket had been removed from state courts (990 of 9852 cases). *BUSINESS*, *supra* note 96, tbl. 103, at 211. Of these removed cases, 4.6% were remanded back to the state courts. *Id.* tbl. 105, at 215. Remands did not all occur immediately: 50.8% were remanded after one year; only 19.1% were remanded in less than six months; and 27.8% were remanded over two years after removal. *Id.* tbl. 106, at 217. Removal use varied greatly across districts: from 48.9% in the Western District of North Carolina to 1.1% in the Eastern District of Louisiana. In more recent times removals have grown from 10,177 (6% of total filings) in 1980 to 25,924 (11.8% of total filings) in 1990. 1990 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT tbl. S-4, at 79 (1990).

106. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), is the case which established the modern guidelines for federal courts applying state law.

107. The court would, of course, also consider opinions from other federal courts deciding similar issues and applying State X's law.

108. *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d Cir. 1942) (under the then-prevailing interpretation of *Erie*, federal judges were "to play the rule [sic] of ventriloquist's dummy to the courts of some particular state").

sarily (although usually this will be the case) as they have been decided by other state courts in the past.¹⁰⁹

The second alternative, available in most but not all states, would be for the federal court to certify a question of law to the State Z Supreme Court.¹¹⁰ The State Z Supreme Court could then choose to accept the certification, and after additional delay, answer the question with an opinion. The opinion might be published, and might require additional analysis applying the law to the facts by the federal court.¹¹¹

After deciding the case, the federal district court could issue an opinion, which the *Federal Supplement* or a specialized employment law reporter might publish.¹¹² The dissatisfied party might

109. 17A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4507, at 89 (1982). A wrongful discharge opinion exemplifying this analysis is a 1981 case examining both Georgia and Texas law. *See Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. 1981). The Fifth Circuit was faced with a claim by an employee that he had been discharged for refusing to commit perjury (similar to the first public policy exception case, *Peterman v. International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of America, Local 396*, 344 P. 2d 25 (Cal. Dist. Ct. App. 1959)). *Id.* at 1052. After finding "no reported case in either jurisdiction which stands on fours with this one," the court turned to predicting the holdings of the Georgia and Texas Supreme Courts. *Id.* at 1055. The court predicted that neither would adopt the exception, stating:

The courts of Georgia and Texas have consistently held to the at-will doctrine. We are unable to perceive the slightest indication of a shift toward recognition of any exception to the at-will rule. Indeed, the intermediate appellate courts of each state have expressly refused to recognize exceptions to the at-will rule when faced with challenges that are analogous, although not identical, to that urged by [plaintiff].

Id. at 1056.

110. Certification is a relatively recent innovation. Although the Uniform Law Commissioners proposed a Uniform Act in 1967, only a few states adopted the act and Wright and Miller conclude that "certification did not play an important role in the federal courts until 1974." 17A WRIGHT ET AL., *supra* note 109, § 4248, at 162-63. Most states provide for certification to the state supreme court from the U.S. Supreme Court and court of appeals and many also allow district courts to certify questions. *Id.* § 4248, at 167-68. Delaware allows certification only from the federal district courts. *Id.* at 168 n.31. *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989), is an example of adoption of an exception to the at-will rule in a certified question context.

111. Some states allow certification only where the answer is determinative of the case. *See* 17A WRIGHT ET AL., *supra* note 109, § 4248, at 170-71. Wyoming, for example, allows certification only where "there is nothing left for the federal court to do but apply the state's answer to the question and enter judgment consistent with the answer. This is a severe restriction since often a great deal remains to be done in the federal proceeding after the state court's answer is received." *Id.* at 169.

112. Even an opinion adopting an exception might not be published. There are no comprehensive statistics on federal district court publication rates. One analysis of employment discrimination cases in one federal district found 80% of the 4310 cases filed between

then appeal¹¹³ to the appropriate federal circuit court of appeals,¹¹⁴ which would also have the option in some states of certifying the question if the district court had not done so.¹¹⁵ From there, the case could go to the full circuit court sitting *en banc*, and, in very unlikely circumstances, to the U.S. Supreme Court.¹¹⁶

July 1, 1972 and March 31, 1987 did not result in a published district court opinion. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1137 (1990). The percentage of cases with published opinions in this area has increased over time, however. *See id.* fig. 1, at 1141. Publication rates also vary considerably across districts. *Id.* at 1144. For example, Volume 812 of the *Federal Supplement*, published in 1993, contains 238 opinions by district courts. Of these, 63 (the largest number) are from district courts in the Second Circuit and ten (the smallest number) are from the Fifth Circuit. Among Second Circuit district courts, over a third of the opinions come from the Southern District of New York while only two opinions are from the Northern District of New York.

Again these statistics suggest an area for concern for researchers, but not a solution. The decision to file in (or remove to) federal court, where possible, rather than state court is likely to be influenced significantly by the time to decision in each of the courts. Plaintiffs may prefer federal court where it is significantly faster, for example. (The decision will also depend on many other factors as well.) This selection effect may cause changes in adoption rates if only state court opinions are counted. *See infra* part II.B.2.

113. A study of selected federal district courts found that 322 of 9852 civil cases pending in 1928-30 were appealed (3.4%) and that 82 of 1816 diversity cases (4.5%) were appealed. BUSINESS, *supra* note 96, at 93. Only 14 of these cases were appealed to the Supreme Court, only one of which was a diversity action. *Id.* tbl. 97, at 205. Although no comparable survey exists for modern times, a rough equivalent can be obtained by comparing district and circuit courts within the same year. In the twelve month period ending June 30, 1989, for example, there were 34,995 total cases begun in the courts of appeals and 233,293 cases begun in the district courts. Of these, 4287 appellate cases and 67,211 district court cases were diversity cases. Roughly equivalent percentages would therefore be fifteen and six percent, respectively. 1989 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT, app. I, tbl. B-7, at 17 & tbl. C-2, at 22 (1989).

114. Appeals in the federal system tend to be resolved relatively quickly. On September 30, 1984, for example, there were 713 cases under submission to federal courts of appeals for more than three months, 424 had been under submission for three to six months, 157 for six to nine months, 70 for nine to twelve months, and 62 for more than one year. BUSINESS, *supra* note 96, tbl. 4, at 6. In the same period, 31,018 cases were terminated and 32,342 filed. *Id.* tbl. 2, at 3. Cases with unpublished opinions are resolved much faster than those which produce a published opinion. *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, tbl. 6, at 594 (1981) [hereinafter, Reynolds & Richman, *An Evaluation*].

115. The question of certification may cloud resolution of the legal issue of primary interest. In *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d at 1051, 1057-58 (5th cir. 1981) (Brown, J., dissenting), for example, one judge dissented from the *Erie* guess on the ground that the court should have certified the issue to the state court.

116. In the 1991 Term, for example, five percent of appeals and petitions for review were granted on the appellate docket and one-half percent of appeals and petitions for

Courts may resolve appeals on either procedural or substantive grounds.¹¹⁷

Identifying when the law changes is not a simple task. Courts are not only not under an enforceable obligation to reveal when they have made an innovation, but the common law reasoning process encourages active concealment of innovation as the decision is portrayed as simply the culmination of a long series of decisions.¹¹⁸ I have identified eleven general areas in which re-

review on the miscellaneous docket were granted. *The Supreme Court, 1991 Term—The Statistics*, 106 HARV. L. REV. 19, 382 (1992). The earlier years' calculation of the percent of appeals and petitions for review which were granted were inflated through erroneous calculations. See *id.* at note d. The U.S. Supreme Court would accept the case only if a significant *federal* question were present since the U.S. Supreme Court would be an *inferior* court to the State Z Supreme Court with respect to State Z's law .

117. Appeals, like district court actions, may be disposed of on either the merits or on procedural grounds. In the twelve months ending December 31, 1991, the federal circuit courts of appeal disposed of 13,004 private civil cases (excluding prisoner petitions and cases involving the federal government) and a total of 41,905 cases. These were disposed of as follows:

	Consolidation	Procedural	On Merits
All cases	3,845 (9.1%)	14,989 (35.8%)	23,071 (55.1%)
Private civil cases	1,426 (11%)	5,193 (39.9%)	6,385 (49.1%)

Source: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, December 31, 1991, Table B-1, at 20 (1992) [hereinafter "1991 AO REPORT"].

Of the terminations on the merits, these took the following form:

	Affirmed/ Enforced	Dismissed	Reversed	Remanded	Other
All cases	18,280 (79.2%)	1,302 (5.6%)	2,668 (11.6%)	530 (2.3%)	291 (1.3%)
Private civil cases	4,975 (77.9%)	269 (4.2%)	987 (15.5%)	116 (1.8%)	38 (0.6%)

Source: 1991 AO REPORT, *supra*, Table B-5, at 23.

118. In the case of employment-at-will, most courts, perhaps recognizing the futility of concealing such a dramatic change, have been relatively open about admitting innovation. See, e.g., *Parner v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (adopting public policy exception and stating that "[b]ecause courts are a proper forum for modifica-

searchers must make decisions: (1) opinions of intermediate courts of appeal and trial courts; (2) federal courts applying state law; (3) dicta;¹¹⁹ (4) unpublished opinions; (5) statutory interpretation cases; (6) sources of cases; (7) definition of the period; (8) flip-flops; (9) dismissals and summary judgments; (10) denials; and (11) *ex post* verification. I now turn to the factors to consider in making these decisions.

1. Intermediate Appellate Courts and Trial Courts

States can have several levels of courts: trial, intermediate appellate, and final.¹²⁰ The state supreme court has the final word on a state's law, so that a new rule can be considered finally adopted only when the state supreme court has spoken.¹²¹ States may operate for years, however, with only intermediate appellate opinions on a subject.¹²² Until then, one intermediate appellate

tion of the judicially created at-will doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases." Such directness is not, however, universal. *See, e.g.,* *Petermann v. International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of America*, Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (creating the first public policy exception without citing authority or acknowledging it was changing a statutory rule). Similarly, when it radically changed its interpretation of New Hampshire's implied covenant exception, the New Hampshire Supreme Court insisted that it had not changed the law. *See* *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980). *See also supra* notes 6 and 81.

119. Opinions which recognize the existence of a cause of action but find it inapplicable to the facts of the case at hand.

120. For details on court structure, see NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989, pt. 4, at 167 (1991) (including flow charts of court structure for each state). Some states have more than one final court, dividing jurisdiction by subject matter: Texas, for example, has both a civil (the Texas Supreme Court) and criminal court of last resort (the Court of Criminal Appeals). Some states have specialized courts of limited jurisdiction which potentially adds a fourth layer from which appeals can go to the general jurisdiction trial courts. Continuing with the Texas example, besides the 384 district courts (10 of which handle only criminal matters), in 1989 Texas had 254 constitutional county courts, 17 probate courts, 157 county courts, 928 justice of the peace courts, and 838 municipal courts. *Id.* at 216. Appeals from some of these courts are to the district courts. For example, county courts have appellate jurisdiction in criminal cases where the original jurisdiction lies with the justice courts and other inferior courts. 2 TEX. GOV'T CODE ANN. § 26.046 (West 1988).

121. The *Monge-Dorr* problem remains, however. *See supra* notes 6 and 81.

122. In California, for example, the California Supreme Court did not address the public policy exception until *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980), over 20 years after *Petermann*, the first intermediate court opinion to adopt the exception. Similarly, in Ohio, Feazel offers the following account of a particular point of law:

court may ignore or disagree with the opinion of another.¹²³ Trial court opinions have even less precedential value.¹²⁴ Whether to count lower court opinions makes a great deal of difference dating the adoptions of exceptions to the at-will rule, as Table 2 shows.¹²⁵

If one is concerned with the final adoption of a rule, one approach may be simply to wait until the state supreme court has spoken. There are a number of difficulties with this approach. First, not all states have intermediate courts of appeal, while some have more than one.¹²⁶ This obviously affects both the incentive struc-

In 1904 a common pleas judge had before him the question of whether or not the owner of real estate could be enjoined from erecting an apartment house upon his lot when the deed by which he acquired the same contained a restriction to the effect that the lot should be used for "residence purposes only." The court decided that the erection of an apartment house would be a violation of the restriction and allowed the injunction in a well written opinion which is reported in the case of *Burton vs. Stapley*, 17 Ohio Decisions 1. This was the first reported decision in Ohio upon this subject, and the case was carried to the circuit court where the decision below was affirmed without report, and from the circuit to the Supreme Court where it was again affirmed without report. 74 Ohio State 461. It thus happened that though both the Circuit Court and Supreme Court had passed upon this important question for a number of years the only reported opinion was that of the trial judge.

E. A. Feazel, *Ohio Case Law*, 4 L. LIBR. J. 9, 13 (1911).

123. In Michigan, for example, one intermediate appellate court panel issued a decision on November 8, 1977, rejecting an implied contract theory, while another issued an opinion on November 9, 1977, accepting the theory. Illinois had a similar experience. See Appendix B for more detailed descriptions of these cases.

124. Sometimes trial court opinions are important. Delaware, for example, adopted the at-will rule through a trial court opinion. See *supra* note 94. In more recent times, some exceptions have been adopted by federal district courts before any state appellate court. See *infra* part II.B.2. See Appendix B for a more detailed discussion of specific lower court opinions.

125. Table 2, *infra*, contains the dates of the opinions adopting exceptions to the at-will rule which meet the following criteria: all are lower state court opinions cited by Krueger, Dertouzos and Karoly, or myself in support of the adoption of an exception, except those which come after a state supreme court opinion which I identified as adopting an exception. For the purposes of this table, I accepted the characterization of the opinions cited by Krueger or Dertouzos and Karoly as they gave them. Some additional research was done to identify cases adopting the rule after intermediate court opinions cited by one or more of the three papers when no other paper cited a later state supreme court opinion.

126. In 1989, for example, 13 jurisdictions had no intermediate appellate court: Delaware, the District of Columbia, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. NATIONAL CENTER FOR STATE COURTS, *supra* note 120, at 70. Seven states—Alabama, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas—had multiple appellate courts at least at one level, which allows for conflicting precedents at that level. *Id.* at 72. The remaining jurisdictions had one intermediate appellate court and one court of last resort.

ture of the courts and the speed with which the court of last resort will speak to an issue. The structure of the intermediate court also makes a difference. Texas, for example, has fourteen courts of appeal, with eighty judges sitting in panels.¹²⁷ Utah, on the other hand, has only one court of appeal with seven judges sitting in panels.¹²⁸ The potential for conflicting rulings among Utah intermediate appellate panels is obviously much lower than the potential for conflict among Texas appellate courts and panels, even after taking into account the differences in caseload which result from differences in population.¹²⁹

Id. at 62-69.

127. *Id.* at 216.

128. *Id.* at 217.

129. The filing rates per 100,000 population are not that different: 56,939 trial court cases in Texas in 1989 versus 41,180 in Utah in 1989. See NATIONAL CENTER FOR STATE COURTS, *supra* note 120, at 106-07. The outputs, however, are quite different: the Utah Court of Appeals reported only 326 signed opinions in 1987, while the Texas Courts of Appeals produced 5,324 (46.67 opinions per Utah judge vs. 66.55 per Texas judge). See *id.* at 96, 98.

Table 2 Intermediate and State Supreme Court Datings

State	Exception	Method	Lower Court	Court of Last Resort
Arizona	IC	M	6/14/83	4/25/84
California	PP	M,R	9/30/59	6/2/80
California	IC	M,K	2/6/76	12/29/88
California	IC	R	3/31/72	12/29/88
California	GF	M,R,K	10/29/80	12/29/88
Colorado	PP	R	7/1/88	1/13/92
Colorado	IC	R,K	6/14/84	1/20/87
Connecticut	PP	M	10/1/85	1/27/87
Connecticut	GF	M	6/10/80	7/3/84
Connecticut	GF	R	1/16/85	None
Illinois	IC	M	12/20/74	1/30/87
Illinois	IC	K	7/26/86	1/30/87
Kansas	PP	M,R,K	6/19/81	3/25/88
Kansas	IC	M,R,K	8/2/84	6/12/87
Minnesota	PP	M,R,K	11/18/86	6/26/87
Missouri	PP	M,R	11/5/85	None
Missouri	PP	K	12/26/79	None
Missouri	IC	M,R	1/18/83	None
New Mexico	PP	M,R	7/5/83	9/21/84
New York	PP	R	7/17/78	Rejected- 3/29/83
N. Carolina	PP	M,R,K	5/7/85	7/26/89
Ohio	PP	M,R	2/11/85	3/14/90
Ohio	IC	M,R	3/21/82	8/9/85
Ohio	IC	K	3/30/84	8/9/85
Oklahoma	IC	M,K	12/28/76	6/9/87
Tennessee	IC	M	11/5/81	None
Texas	PP	M,R	6/7/84	4/3/85
Texas	IC	M	4/11/85	None
Wisconsin	PP	M,K	1/28/80	7/1/83

Method: K: Krueger; M: Morriss; R: Dertouzos & Karoly (RAND)

Key: IC: Implied Contract; GF: Good Faith; PP: Public Policy

There is scattered research on the effects of creation of an intermediate appellate court on a state's legal system.¹³⁰ Researchers have hypothesized two primary effects: (1) a reduction in the workload of the court of last resort, and (2) increased policymaking by the court of last resort.¹³¹ These effects will result in several important differences in the appearance of legal innovations. First, to the extent that intermediate courts concentrate on routine decisions, cases which could result in a policy innovation will take longer to reach courts of last resort, potentially delaying the innovation. Second, the intermediate court may increase the chance of the court of last resort adopting an innovation by allowing the final court more time to consider the cases it does decide.

PRINCIPLE 4: Researchers should base their choice of whether to include intermediate or trial court decisions on the theoretical model. They should include lower court opinions when modeling changes in the law but exclude those opinions when modeling the behavior of courts of last resort.

2. Federal Courts

Even when only state common law is concerned, federal courts play an important role since a federal court may consider a state's common law on a subject before the state's own courts have spoken.¹³² Table 3 shows the dates of the federal opinions in the

130. The most comprehensive surveys of this research are NATIONAL CENTER FOR STATE COURTS, *INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING* (1990), and John A. Stookey, *Creating an Intermediate Court of Appeals: Work Load and Policymaking Consequences*, in *THE ANALYSIS OF JUDICIAL REFORM* 153 (Philip L. Dubois ed., 1982).

131. See Stookey, *supra* note 130, at 153. Stookey argues that the crucial step is the granting of discretionary review authority to the court of last resort. See *id.* at 165-66. Since that review is impossible without the creation of an intermediate court, the distinction does not seem to be critical.

132. For example, I found six federal court diversity opinions which I considered to be the first to adopt a particular exception to the at-will rule. These are: *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (Mississippi public policy exception); *Newman v. Legal Serv. Corp.*, 628 F. Supp. 535 (D.D.C. 1986) (District of Columbia public policy exception); *Winther v. DEC Int'l Inc.*, 625 F. Supp. 100 (D. Colo. 1985) (Colorado public policy exception); *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805 (D. Colo. 1983) (Colorado implied contract exception); *Frazier v. Colonial Williamsburg Found.*, 574 F. Supp. 318 (E.D. Va. 1983) (Virginia implied contract exception); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (Massachusetts public policy exception). For an in-depth discussion of the role of federal courts in Pennsylvania, see Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employ-*

wrongful discharge area relied on by the three papers discussed here as well as the subsequent state court rulings and shows that counting federal opinions makes a significant difference.¹³³

Table 3 Federal vs. State Court Opinions

State	Exception	Method	Erie Guess	State Court
Alabama	Implied Contract	Krueger	8/14/84	7/10/87
Colorado	Public Policy	Morriss	9/18/85	7/1/88
Colorado	Implied Contract	Morriss	10/18/83	6/14/84
D.C.	Public Policy	Morriss	1/26/86	9/17/91
Iowa	Good Faith	Krueger	3/16/84	None
Massachusetts	Public Policy	Morriss	5/28/80	2/18/82
Mississippi	Public Policy	Morriss	7/17/87	8/19/93
Virginia	Implied Contract	Morriss	9/9/83	None

How should one treat opinions by these courts? One approach is a categorical exclusion.¹³⁴ Some circumstances may justify this approach. For example, if one is modeling the behavior of judges, state court judges will obviously have different incentives to adopt a change than federal judges because state court judges often are elected or appointed for relatively short terms while federal judges are appointed for life.¹³⁵ If the concern is the effect of the law on the behavior of others, a categorical exclusion is difficult to sup-

ment At Will Doctrine in Pennsylvania, 133 U. PA. L. REV. 227 (1984). In addition, New Mexico first formally recognized the at-will rule through a federal court opinion. See *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123, 128 (10th Cir. 1953), *cert. denied*, 345 U.S. 947 (1953). See also Andrew P. Morriss, *Exploding Myths: An Empirical & Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, app. A (1994) [hereinafter Morriss, *Exploding Myths*] (providing the citations relied on for dating the establishment of employment-at-will).

133. Table 3, *infra*, includes all federal opinions cited by any of the three papers except opinions which are dated after a state court opinion which I identified as adopting the exception. For the purposes of this table, I accepted the characterization of the opinions cited by Krueger or Dertouzos and Karoly as they gave them.

134. That is, for example, the strategy Dertouzos and Karoly chose. See DERTOUZOS & KAROLY, *supra* note 2, at 10 n.3.

135. This is especially true of territorial judges who were appointed for limited terms but whose incentives were very different from those of state court judges after statehood. See Morriss, *Exploding Myths*, *supra* note 132, at 720-22. In these cases, the existence of a federal court decision might be handled more properly as an independent variable or the adoption by either court treated as competing risks.

port. Federal judges' role under the *Erie* doctrine is to anticipate the development of the law in the state.¹³⁶ Their judgment is a strong indicator that the law has in fact changed, although their record is not perfect.¹³⁷ Thus, where the model is of a change in the law, there is little justification for a categorical ban.

In general, a case-by-case analysis of the federal court opinions seems to be the best approach. Factors to consider should include the familiarity of the court rendering the opinion with the law of the state in question,¹³⁸ the importance of the doctrine to the result,¹³⁹ and the strength of the court's opinion.¹⁴⁰

PRINCIPLE 5: Researchers should count federal court diversity opinions when the model concerns the behavior of the

136. See *supra* notes 103-109 and accompanying text.

137. See, e.g., *Samples v. Hall of Mississippi, Inc.*, 673 F. Supp. 1413 (D. Miss. 1987). The federal court initially made an *Erie* guess that Mississippi would allow an implied contract claim based on supervisory guidelines governing terminations and allegations of promises to employees. *Id.* at 1417. Shortly before this opinion was issued, the Mississippi Supreme Court rejected the doctrine in *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086 (Miss. 1987). When the federal court became aware of that opinion, it modified its holding to find that the implied contract theory was not available. *Samples*, 673 F. Supp. at 1418-19.

138. For example, more weight should be given to a federal court sitting in Texas interpreting Texas law than a federal court in Illinois interpreting Texas law. See *infra* notes 257-58. The classic reference on this point is *Bishop v. Wood*, 426 U.S. 341, 345 (1976). See also Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899 (1989) (summarizing and analyzing circuit court deference to district court rulings on state law).

139. For example, the conclusion of the court in *High v. Sperry Corp.*, 581 F. Supp. 1246 (S.D. Iowa 1984), that there was sufficient evidence to survive a motion to dismiss is worthy of less attention than a direct *Erie* guess that a cause of action exists in a state as in *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980). Weaker still is *Hass v. Picker Int'l Inc.*, 122 L.R.R.M. (BNA) 2367 (D. Mass. 1986). The BNA *Individual Employment Rights Manual* summarizes the three-paragraph opinion as allowing a claim based on "statements in an employee handbook and representations by the employer's agent that [the employee] would be employed for a term in excess of one year." BUREAU OF NATIONAL AFFAIRS, *INDIVIDUAL EMPLOYMENT RIGHTS MANUAL* 505:434 (1991). That opinion merely rejected a summary judgment motion, saying "although plaintiff's evidence appears to be gossamer thin it cannot be ruled with certainty that there is no question of material fact lurking in this case." *Hass*, 122 L.R.R.M. (BNA) at 2368. Given the procedural posture, this is less than "gossamer thin" authority for the existence of such a cause of action in Massachusetts. See also discussion *infra* part II.B.3.

140. *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805 (D. Colo. 1983), embodies both a strong and weak finding in one opinion. With respect to the implied contract exception, *Brooks* made a careful argument as to why Colorado would recognize the exception. *Id.* at 808-10. With respect to the public policy exception, however, *Brooks* misstated previous precedent. *Id.* at 809. See also Appendix B.

public or change in the law but not when modeling state courts' behavior.

3. Dicta

Cases III, IV, and V in Table 1 present an additional problem area. In these types of opinions, courts hint that they are sympathetic to claims that the law really is Rule X, but some other rule prevents them from reaching that issue. Their comments about Rule X are therefore dicta and not binding on future courts deciding the issue. The strength of dicta varies enormously. The weakest version might simply mention that a party has made a claim that Rule X applies but never go beyond the simple mention of the claim.¹⁴¹ At the other extreme, a court could undertake an extensive analysis of a rule but ultimately decide not to reach the issue on the merits.¹⁴² How should one handle these cases? The answer will again depend upon the model under consideration.

The common law exceptions to the at-will rule provide an

141. See, e.g., *Hass*, 122 L.R.R.M. (BNA) at 2368. "Given the fact that a complaint is to be read favorably to the party resisting a motion for summary judgment, I rule that although plaintiff's evidence appears to be gossamer thin it cannot be noted with certainty that there is no question of material fact lurking in this case." This passage is the entire substantive discussion of this issue in this opinion.

142. See, e.g., *M.B.M. Co. v. Counce*, 596 S.W.2d 681 (Ark. 1980). In between these two extremes is *Chin v. AT&T*, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978) (subsequent history omitted). In the trial court opinion in *Chin*, the court discussed a public policy claim, which it termed a claim under "the doctrine of abusive discharge":

Although it does not appear that this doctrine has been recognized in this state, it is appropriate, on a motion of this nature, to examine the elements of the cause of action to determine whether the complaint alleges sufficient facts upon which relief might be granted at trial. Since plaintiff is proceeding on a cause of action not presently recognized in this state, he bears a heavy burden of demonstrating that this new cause of action should be adopted. . . .

At the threshold, the doctrine of abusive discharge places upon the plaintiff the burden of persuading this court that (1) there is a public policy of this state that (2) was violated by the defendant. Plaintiff herein has not sufficiently demonstrated that public policy, derived from or bottomed on New York constitutional, statutory or decisional law, exists that would restrict the right of a private employer to discharge an employee at will due to the employee's political beliefs, activities and associations.

This is not to say that such public policy does not exist; it merely is to say that plaintiff herein has not sustained his burden of persuasion. While this court is not averse to recognizing new causes of action or defenses where clearly warranted, such recognition should only be given upon a substantial showing which has not been made here.

Id. at 740-41 (citation omitted).

excellent example of this issue. Particularly in the 1970s and early 1980s, courts often indicated sympathy for a particular exception in dicta but then concluded that, even if the exception were to be adopted, that this particular plaintiff would not qualify for it. Whether such an opinion should count depends on how strongly the opinion endorsed the theory. For example, in *Abrisz v. Pulley Freight Lines, Inc.*,¹⁴³ the Iowa Supreme Court stated:

This appeal is before us on a narrow and clearly defined issue. Plaintiff asks us to carve out an exception to the employment at-will rule and to provide a remedy when such employment is terminated for reasons contrary to public policy. This doctrine has recently gained considerable favor with courts. . . . We do not decide if an employee under an at-will contract is without a remedy under any circumstances, as the dissent in *Monge v. Beebe Rubber Co.* and authorities there cited insist. We hold only that under the facts of this case there is no showing that plaintiff's discharge was violative of public policy.¹⁴⁴

Since the court avoided the issue entirely, I did not consider *Abrisz* as adopting the public policy exception, even though a plaintiff later argued the opinion established the exception.¹⁴⁵ On the other hand, I did use *Jackson v. Minidoka Irrigation District*.¹⁴⁶ In dicta, the Idaho Supreme Court stated, "[a]s a general exception to the [at-will] rule . . . an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."¹⁴⁷ This unambiguous statement, later relied on by the same court as the source of the rule,¹⁴⁸ is sufficient to create the perception that the rule has changed.

Dicta must be handled carefully. Reliance on it can cause major changes in datings. In the case of Idaho's public policy exception, for example, the dicta upon which Dertouzos and Karoly and I relied predates the more conclusive opinion counted by Krueger by eight years.¹⁴⁹ Scholars can avoid over-counting or under-counting only by careful legal analysis of the opinions.¹⁵⁰

143. 270 N.W.2d 454 (Iowa 1978).

144. *Id.* at 455-57 (citations omitted).

145. *See* Springer v. Weeks & Leo Co., 429 N.W.2d 558, 559-60 (Iowa 1988).

146. 563 P.2d 54 (Idaho 1977).

147. *Id.* at 57.

148. *See* MacNeil v. Minidoka Mem. Hosp., 701 P.2d 208, 209 (Idaho 1985).

149. *See* Appendix B.

150. Dertouzos and Karoly cite dicta in *Jones v. Keogh*, 409 A.2d 581 (Vt. 1979) for a

PRINCIPLE 6: Careful legal analysis of dicta is necessary to determine whether it is a basis for counting a case.

4. Unpublished, Depublished, and Limited Authority Opinions

Courts do not publish all their opinions¹⁵¹ and not all published opinions are officially published.¹⁵² This creates a dilemma

narrow public policy exception and *Payne v. Rozendaal*, 520 A.2d 586 (Vt. 1986) for a broad one. Krueger and I counted only *Payne*. In rejecting a public policy claim, the *Jones*' court noted:

The basic common law rule which still is widely accepted is that which was pronounced by this Court in *Mullaney v. C.H. Goss Co.* Ever present in those opinions recognizing the common law rule is the concern that acceptance of a rule extending enforceable contract rights to an at-will employee would destroy the mutuality of obligation extant in such employment relationships. Accordingly, courts generally have been unwilling to uphold suits by discharged employees at-will unless there is a *clear and compelling* public policy against the reason advanced for the discharge.

While full employment and employer-employee harmony are noble goals to which society aspires, they alone do not present the clear and compelling public policies upon which courts have been willing to rely in upholding an action for discharge of an employee at-will. Nor is the fact that bad faith, malice and retaliation are motives upon which we look askance sufficient to impel us to find a clear and compelling public policy where, as here, there is none.

Jones, 409 A.2d at 582 (citations omitted). *Payne* later cites a fragment of this language: "In Vermont, under an "at-will" employment contract, an employee may be discharged at any time with or without cause, 'unless there is a *clear and compelling* public policy against the reason advanced for the discharge.'" *Payne*, 520 A.2d at 588 (emphasis in original) (quoting *Jones*, 409 A.2d at 582). Thus *Payne's* discussion of what "courts generally" have been unwilling to do was transformed into the definition of Vermont's public policy exception. Justice Peck's dissent notes that *Jones* is actually a unanimous endorsement of the at-will rule. *Id.* at 591-92 (Peck, J., dissenting). Despite the *Payne* court's reference to *Jones*, it would be difficult to construe its passing reference to "courts generally" as forecasting a change in a Vermont rule it had just endorsed.

151. "Opinion" is an imprecise term. Courts issue a variety of products: orders, memoranda, per curiam opinions, signed opinions, judgments, and so forth.

152. Federal district court opinions are not officially published but are widely available in West's Federal Supplement, online in WESTLAW and LEXIS, and in a variety of subject matter and other services which publish opinions (including those of other courts) unofficially. Some of these, such as the CCH and BNA services, have wide circulation. Others do not. One example is *Coffey's Probate Decisions*, which consist of the decisions of Judge James V. Coffey, a 19th century judge of the probate court in San Francisco. A commentator describe these reports as follows:

Although not buoyed up, nor made prominent through the prestige of a high court, yet by virtue of his learning and great ability as a judge, his decisions have attained renown and permanency on their merits, having been published in six volumes at \$5.00 each, and being of exceptional value to a practitioner.

Fred H. Peterson, *Court Opinions and Reports*, 86 CENT. L.J. 428, 430 (1918).

for researchers: should they count unpublished opinions? If so, how can scholars find these opinions? One appellate judge termed such opinions "a personal letter from the panel to the trial court judge and the parties informing them of the decision and the rationale behind it."¹⁵³ It is tempting to resolve these questions with a simple bright line rule: only opinions which appear in official reporters count. Such a rule certainly eases the burden for the researcher. It also has the ring of common sense: if a court chooses not to publish an opinion, it cannot be important and should not count because the law's addressees will not be aware of the change. In many circumstances, however, adopting such a rule would be a serious mistake.¹⁵⁴ For example, when unpublished decisions are

Ohio's publication history is well-documented and presents an excellent example of the multiplicity of unofficial reports. Official reporting of Ohio Supreme Court decisions began in 1823, although the Court was organized in 1803. In addition to the official reports, a volume of "Ohio Supreme Court Decisions (Unreported)" was issued. Appellate courts called "district courts" sat from 1851 to 1883 and a commentator notes that "[their] opinions carried great weight." Feazel, *supra* note 122, at 10. Their decisions were not officially reported, but many appeared in legal periodicals and many were later reprinted in *Ohio Decisions, Reprint* which was published between 1869 and 1899. *Id.* at 11. This reporter not only included decisions published earlier but also approximately 100 opinions previously "overlooked." *Id.* at 12. The opinions of the Ohio Circuit Courts, courts which existed from 1885 to 1912, were reported in three sets of reporters. George C. Trautwein, *Ohio Courts and The Reports of Their Decisions*, 7 U. CIN. L. REV. 60, 64-65 (1933). The Courts of Appeals, which replaced the Circuit Courts in 1912, had opinions reported among six different reporters, some officially and some not. *Id.* at 65-66. In addition, a number of trial courts also had opinions published in a variety of reporters. See generally William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 315-18 (1985); Robert L. Black, Jr., *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107 (1982); Trautwein, *supra*. Despite repeated attempts to suppress the unpublished opinions, market demand continued to be met by private publishers.

In 1915, Ohio appellate judges were given the power to choose which opinions were to be published. The judges published a small fraction of all cases handed down, successfully reducing the weight of the official reports, but unreported cases refuse to lie dormant. Private periodical services began to appear. Unreported cases from certain courts are kept in complete files in the courts and collected by local firms by subscriptions. . . . Many cases turn upon the adequacy of the unofficial reports and follow cases cited in the better unofficial reports.

Mark Wood, *Selective Publication of Case Law*, 39 S. CAL. L. REV. 608, 612 (1966).

153. Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 151 (1984-1985) (quoting Judge McDonald, *Chance of Publishing?*, 3 LOUISVILLE L. 26, 27 (Winter 1982)).

154. This is particularly true of research into cases' attributes, a subject not treated in this paper. See Siegelman & Donohue, *supra* note 112, at 1150-56, for a review of the differences between published and unpublished cases in this regard. For example, Siegelman and Donohue found important differences between published and unpublished

widely circulated, failing to count them may result in overestimating the time until adoption of a particular legal change.

Courts' creation and use of unpublished decisions poses a far more complex problem than the "personal letter" characterization suggests. Attorneys seek out and regularly make use of unpublished opinions, and any study which attempts to measure the impact of decisions on the bar and/or clients must consider unpublished opinions generally available among the population of interest.¹⁵⁵

employment discriminations opinions with respect to the types of claims pursued, the statute relied on, the type of discrimination alleged, the occupation of plaintiffs, the industry of the defendants, the remedy sought, and the outcomes. *Id.*

155. Although one of the goals of nonpublication is to avoid publication of opinions which are merely repetitive statements of existing law, there is a substantial set of complaints in the literature claiming that cases which have made new law are frequently unpublished. *See, e.g.,* James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice*, 61 A.B.A. J. 1226 (1975); David Newbern & Douglas Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37, 48 (1978); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 827-28 (1979) [hereinafter Reynolds & Richman, *Limited Publication*]; Pamela Foa, Comment, *A Snake in the Path of the Law: the Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 316-38 (1977).

One commentator describes how the First District Court of Appeals in Ohio has an index available to the bar, beginning with 1972 and containing 2500 cases; other districts also have indices. Black, *supra* note 152, at 109. Black also notes that *Ohio Appellate Decisions* on microfiche covers all opinions beginning in 1981 and that Banks-Baldwin Law Publishing Company publishes an Ohio Appellate Decisions Index. *Id.* at 112. *The Ohio Revised Code Annotated* published by Banks-Baldwin also digests these unpublished opinions.

In Arkansas, where "unpublished" opinions are in fact published in the *Arkansas Legislative Digest*, an unofficial supplement to the official Arkansas Reports, over 65% of attorneys responding to a questionnaire answered the question "Do you usually read the 'unpublished opinions' [of the Arkansas Supreme Court]?" as either "Definitely yes" or "To some extent yes." Newbern & Wilson, *supra*, at 40-42. *See also* J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 792 n.4. (1975) (noting the formation of a subscription service by the Federal Bar Association for federal district court opinions in New Jersey); Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 387, 436 n.12 (1973) ("My own practice is largely appellate in nature, and it generally falls into the substantive field of eminent domain. I have, therefore, assiduously collected all unpublished opinions relating to eminent domain. . .").

Kanner mentions the "Unpublished Cases Department" of the *California State Bar Journal*. *Id.* at 447 n.77. *See also* Jacobstein, *supra*, at 798 n.36 (noting California subscription service for search and seizure cases and quoting editor as saying "subscribers from all over the state report winning case after case in trial courts by citing unpublished opinions"). In earlier times in California when the Supreme Court was the only court of appeal, it did not publish all its opinions, which led to the privately published *California Unreported Cases Reporter*. Eugene M. Prince, *Law Books, Unlimited*, 32 A.B.A. J. 134, 136 (1962). *See also* Wood, *supra* note 152, at 612 n.14. Similar circumstances existed in Texas, where Posey's *Unreported Cases* filled the gap for Texas practitioners. *See also*

Despite formal rules prohibiting citation of unpublished opinions, these opinions often still reach and influence decisionmakers.¹⁵⁶ Even among published opinions, subsequent court action limits some opinions' authority in ways more subtle than a simple reversal. Higher courts may indicate a degree of approval in denying a request for discretionary review or, less subtly, an opinion may be "depublished."¹⁵⁷

Although complaints about the volume of reported decisions¹⁵⁸

Gerald T. Dunne, *Editor's Headnotes*, 99 BANKING L.J. 387, 387 (1982) ("Unfortunately banking law decisions, either at the trial level or otherwise, may pass unreported for a variety of reasons. Hence, the *Journal* would be pleased to receive copies of such material from the banking bar for appropriate reproduction in its pages."); Allan D. Vestal, *Reported Opinions of the Federal District Courts: Analysis and Suggestions*, 52 IOWA L. REV. 379, 396 n.63 (1966) (describing unofficial reports of unreported decisions in California, Louisiana, Mississippi, Michigan, Nebraska, New York, Ohio, Tennessee, Texas, and Virginia).

156. If the behavior of a large institutional litigant which repeatedly litigates in an area is the issue (the government, for example, in criminal cases or appeals of social security disability cases), it is quite likely that litigant will take steps to make use of unpublished decisions. See, e.g., Lauren Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeal*, 87 MICH. L. REV. 940, 956-59 (1989). Prof. Robel surveyed offices within the Justice Department and U.S. Attorneys. *Id.* at 956-59. The responses received indicated a universal use of unpublished opinions within the office. *Id.* at 958-59. Interestingly, the Executive Office of the United States Attorneys "determined that responses [to the survey] would not be in the best interest of the Justice Department" and forbade responses. *Id.* at 959 n.87.

Render describes some of the ways in which unpublished opinions can influence a decision maker:

A trial judge is very likely to remember how the appeals court ruled on an issue he decided. The judge is also very likely to decide a subsequent case in accordance with prior decisions of the appellate court. Indeed, the judge may feel duty bound to do so, whether the decision is published, cited or not. Trial judges can also learn about unpublished cases from fellow judges, especially in Kentucky's larger circuits. . . .

Judges have related stories to this author about receiving unpublished decisions in the mail anonymously, or having them slipped under their office doors.

Render, *supra* note 153, at 163.

157. See *infra* notes 174-77 and accompanying text (describing the "depublishing" process).

158. The number of published opinions has grown dramatically over time. An oft-cited estimate, which does not reveal how it was calculated, is that the following number of decisions have been published:

1790-1840:	50,000
1840-1890:	450,000
1890-1940:	1,250,000
1940-1960:	600,000-700,000

Prince, *supra* note 155, at 134.

The percentage of federal circuit court opinions published fell dramatically after the

date back almost to the first common law reports,¹⁵⁹ the time period under consideration is an important factor in whether to count a particular opinion, because publication and citation practices have varied significantly across time as well as among courts.¹⁶⁰ While the variation is too great to permit a summary here,¹⁶¹ the key lesson is that the period under study will affect the decision of

Federal Judicial Center recommended limited publication in 1971, from 48.4% in 1973 to 37.2% in 1977. Reynolds & Richman, *Limited Publication*, *supra* note 155, at 808.

159. Reporting in the United States began in the 19th century, largely in private hands. See Reynolds & Richman, *An Evaluation*, *supra* note 114, at 575-76. A short list of such complaints includes John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMPLE L.Q. 13 (1949) (expressing general concerns about the number of published opinions); Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 472-73, 476 (1915-1916) (noting 175,000 pages of decisions added to Harvard Law Library in year ending June 30, 1915, and quoting Sir Edward Coke to the effect that there were too many published opinions in his time); John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915) (noting that 65,379 decisions of federal courts and state courts of last resort were published in 1909-13, filling 630 volumes). The earliest complaint I have discovered is a reference to a complaint by Sir Matthew Hale, Lord Chief Justice in 1671. See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 141 (1965). The earliest American complaint is a mention of an 1831 complaint by Joseph Story about the number of reports in Judge O'Connell's diatribe. O'Connell, *supra*, at 14.

160. See Reynolds & Richman, *An Evaluation*, *supra* note 114, at 575-77, for a brief history of publication of judicial opinions. Fragmentary results are available for some states; no definitive survey exists. Courts' use of precedent has also varied over time. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 23-28 (1977).

161. Publication in the United States generally is a decision made by the court. West Publishing, for example, never refuses to publish an opinion. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 815 (1961). The individual states and federal circuits have used various methods to determine which opinions to publish. See Francis P. Whitehair, *Some Suggestions for the Elimination or Reduction of Publication of Unnecessary Opinions*, 21 FLA. L. REV. 225, 228-29 (1947). Among the methods used are commissions, discretion of the court, and mandatory publication. Some courts publish all their opinions. The United States Supreme Court, for example, publishes all its opinions, although a few early 18th century opinions were not published. Most courts do not publish all their opinions. Some courts, such as the Fifth Circuit, have rules allowing them to decide cases without written opinion. See, e.g., 5TH CIR. R. 47.6. There is thus no "opinion" left unpublished in those cases; in others there is a written but unpublished opinion. Some of the courts which selectively publish their opinions have formal policies describing, with varying degrees of specificity, the criteria used to select opinions for publication. There is a surprisingly large amount of legal literature on the merits of these policies which provides some guidance, but there is no comprehensive guide to publication policies across courts and across time. The most comprehensive source on this issue is Leah Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIBR. J. 362 (1974). This article covers the then-current policies in all states and federal circuits. The publication policies which are the best documented are those of the federal appellate courts and these can be used as examples here. See generally Reynolds & Richman, *An Evaluation*, *supra* note 114, at 575-77 and Reynolds & Richman, *Limited Publication*, *supra* note 155, at 810-14.

how to handle unpublished and limited authority cases. From the limited research in existence, there is evidence of considerable variation both between and within courts in the content and nature of these opinions.¹⁶² Researchers deciding how to use unpublished and limited authority materials need to consider several issues with respect to particular courts: (i) publication policies; (ii) distribution policies; (iii) citation policies; and (iv) limitations on authority. Because the policies have changed over time and across courts, the answer may also differ from court to court and across time.

Court opinions fill many needs other than providing precedent.¹⁶³ Both published and unpublished opinions resolve particular disputes. Although not providing general precedent, unpublished opinions establish the law of the case for the case in which they arose and are sometimes used for preclusion purposes.¹⁶⁴ Under some circumstances, they provide precedent. Where courts have adopted formal publication policies which establish criteria for publication, these policies provide valuable guidance to the researcher. Even when such policies exist, and they are all too rare at the state level,¹⁶⁵ the researcher must still be alert to an opin-

162. The Ninth Circuit, for example, wrote lengthy unpublished opinions in social security disability appeals. Robel, *supra* note 156, at 943 n.17. In Kentucky before 1976, unpublished decisions of the Kentucky Supreme Court consisted of a simple statement that the decision below was correct. One such opinion is quoted in full in Render, *supra* note 153, at 147: "This case has been reviewed by a panel of three circuit judges and by this court. All are of the opinion that the judgment is correct and should be affirmed." *Decoursey v. Ashland Oil & Refining Co.*, No. F-20-72 (Ky. Sept. 27, 1974). Where unpublished decisions are of such character, the interest lies primarily in whether they strengthen or weaken the lower court opinion.

163. Most obviously, opinions resolve a legal issue between parties. In doing so, the opinion demonstrates that the appellate court has considered the issues raised by the appellant, and so encourages confidence in the judicial system. In the case of reversals, opinions inform the lower court of the rationale for overturning decisions. Opinions also provide a record for use in future assertions of collateral estoppel, law of the case, and *res judicata*.

164. For example, a federal district judge in the Northern District of Illinois held that a prior unpublished opinion from the same district holding a Chicago statute unconstitutionally overbroad and vague required the statute be held unconstitutional in a new suit five years later by different plaintiffs. See George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 482-83 (1988).

165. Most states have no official standards for publication. See Chanin, *supra* note 161, at 362. The Federal Judicial Center has published *Standards for Publication* as a recommendation for federal courts of appeal, and these standards are useful in considering what may be published:

(1) the opinion lays down a new rule of law, or alters or modifies an existing rule; (2) the opinion involves a legal issue of continuing public interest; (3) the opinion criticizes existing law; or (4) the opinion resolves an apparent conflict

ion which gains widespread currency with the bar without publication.¹⁶⁶ One cannot, therefore, regard such policies as conclusive.

When the research concerns the impact of decisions on the bar and/or public, the distribution of unpublished decisions is an important factor. Some courts limit distribution to the parties and lower court;¹⁶⁷ others permit subscription to unpublished decisions.¹⁶⁸ When the distribution of the opinion is limited, its impact on the public and bar is likely also to be limited.

In addition to limiting publication and distribution, some courts have formal rules governing citation of unpublished decisions. Some courts allow citation of unpublished opinions as precedential authority without limit,¹⁶⁹ others limit the circumstances under which they may be cited,¹⁷⁰ while still others forbid their cita-

of authority.

COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COMMITTEE FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, FEDERAL JUDICIAL CENTER RESEARCH SERIES NO. 73-2 15-17 (1973).

166. For example, the intermediate appellate court opinion in *Wagenseller v. Scottsdale Mem. Hosp.*, 714 P.2d 412 (Ariz. 1984), *aff'd in part, rev'd in part, remanded, and vacated*, 710 P.2d 1025 (Ariz. 1985), gained widespread attention in Arizona despite being unpublished until after the Arizona Supreme Court's opinion in the case. *See supra* note 101. Its notoriety was due to the combination of its bizarre facts and the comprehensive nature of the opinion. *Wagenseller*, 714 P.2d at 414. (*See infra* note 245 for a discussion of *Wagenseller's* newsworthiness.) Since the opinion did not adopt a public policy exception, I did not count it here—the example is merely illustrative of the type of case which attains widespread attention. Finding that opinion was easy when I was searching for the opinions in 1992 because the intermediate appellate opinion was published by West after the later Arizona Supreme Court opinion was published.

167. *See* DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS tbl. 6 (1985) (describing the policies of the federal circuits).

168. The Tenth Circuit even created an index of unpublished opinions which was available by subscription and at 60 law libraries within the circuit. *See Reynolds & Richman, Limited Publication, supra* note 155, at 813-14 n.35.

169. *See, e.g.*, 5TH CIR. R. 47.5.3 (stating that "[u]npublished opinions are precedent"); TENN. S. CT. R. 4(5) (allowing citation of unpublished decisions if a copy is provided to opposing counsel and the court). California no longer allows citation, but prior to adoption of the current rule it did and followed unpublished cases as precedent. *See, e.g.*, *MacDonald v. MacDonald*, 102 P. 927 (Cal. 1909).

170. *See* 7TH CIR. R. 53(b)(2)(iv) (requiring litigant to appear before the court and have an unreported decision certified before citing it); 10TH CIR. R. 36.3 (allowing citation if a copy is provided to opposing counsel); IOWA S. CT. R. 10(f) (allowing citation only for cases involving the same parties); WIS. STAT. ANN. 809.23(3) (West 1994) (allowing citation only to support a claim of *res judicata*, collateral estoppel, or law of the case).

Ohio furnishes an interesting example of a state where unpublished opinions are given limited precedential force. Although Ohio law specifically provides that courts are not to recognize unreported opinions, in practice they routinely are cited. *See Black, supra* note 152, at 109; Chanin, *supra* note 161, at 372. Since fewer than five percent of Ohio intermediate appellate opinions are published each year, several systems have sprung up to

tion.¹⁷¹ Where the issue is when the law changed, the precedential value of unpublished opinions is critical to the determination of whether to count the opinion.

The inclusion of unpublished material on LEXIS and WESTLAW makes identification of recent unpublished opinions easier (and more important) for researchers. A study of legal changes in all states in the 1920s, for example, could not include as thorough an analysis of unpublished opinions (although it would have to address the use of unofficial reporters), while a study of changes in the 1980s could and should be much more complete. Studies of a particular state, and treatment of the identified decisions, should be based on consideration of factors such as citation, publication, and distribution policies and the existence of distribution mechanisms.

Even when courts have published opinions, subsequent events short of direct review may affect the opinions' precedential value. Some states have or have had procedures for giving partial approval or partial disapproval to opinions of lower courts.¹⁷² Opinions also sometimes disappear between the advance sheets and the final reporter volumes.¹⁷³ These are not simply unpublished opinions

provide attorneys with unpublished opinions. See Black, *supra* note 152, at 107 n.2. Professional associations of attorneys provide both summaries and full reports of unpublished opinions in various areas. *Id.* at 108-09.

171. See 9TH CIR. R. 36-3 ("A disposition that is not for publication shall not be regarded as precedent . . . except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."); ARK. S. CT. R. 5.2(d). See generally Newbern & Wilson, *supra* note 155. For a useful comparison of citation policies, see Reynolds & Richman, *Limited Publication*, *supra* note 155, at 812-14.

172. In Texas, for example, the state Supreme Court can refuse to hear discretionary cases with one of several notations. "Writ refused" and "writ refused no reversible error," for example, denote cases with greater and lesser authority, respectively; cases in which no writ of error has been sought are reported with the notation "no writ." The writ history is rarely reported outside Texas and is not mentioned in the Bluebook.

During the first part of this century, the California Supreme Court commented on lower court opinions without writing new ones: it "withheld its approval" of some, "approved" part or all of others, and "expressed no opinion" as to the merits of others. See, e.g., Robert G. Berrey, Comment, 13 S. CAL. L. REV. 461 (1940); Comment, *Courts: Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying A Hearing After Judgment*, 28 CAL. L. REV. 81 (1939). Clearly, researchers need to be aware of such procedures and their effects as to the validity of lower court opinions.

173. See Render, *supra* note 153, at 156-58 for a description of such a case in Kentucky. The parties settled after the Kentucky Court of Appeals had ruled and the opinion had appeared in the *Kentucky Law Summary*. After settlement, the parties made a joint motion to the Kentucky Supreme Court asking that the Court of Appeals opinion not be published; this motion was granted. Curiously, the order directing the case not be pub-

but opinions whose bases have been questioned. They should therefore not be counted, although their existence should be noted.

Finally, since 1971, California has used a practice which allows the California Supreme Court to order decisions of the lower courts "depublished."¹⁷⁴ These decisions are omitted from the official reports¹⁷⁵ and are unavailable as precedent.¹⁷⁶ Depublished opin-

lished was itself unpublished, meaning that someone reading the case in the *Kentucky Law Summary* would be unaware that the case should not be cited. *Id.*

174. Beginning in 1964, the intermediate appellate courts gained the authority to refrain from publishing opinions. The presumption was in favor of publication. After 1972, the presumption was reversed. See Kanner, *supra* note 155, at 388.

175. Estimates of the number of depublished opinions are given below.

Year	Number	Year	Number
1970-71	1	1981-82	N/A
1971-72	3	1982-83	120
1972-73	20	1983-84	N/A
1973-74	22	1984-85	N/A
1974-75	12	1985-86	N/A
1975-76	45	1986-87	N/A
1976-77	34	1987-88	126
1977-78	35	1988-89	142
1978-79	35	1989-90	117
1979-80	N/A	1990-91	100
1980-81	N/A		

Sources: 1971-72: Robert S. Gerstein, "Law by Elimination:" *Depublication in the California Supreme Court*, 67 JUDICATURE 293, 296 (1984).

1972-77: Julie Haywood Biggs, Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181, 1200-06 (1977).

1978-79: Julie Hayward Biggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577, 1594-96 (1979).

1982-83: Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 486 (1988).

1987-91: Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil?*, 26 LOY. L.A. L. REV. 1007, tbl. 1, at 1022 (1993).

176. Unpublished opinions of the court of appeals may not "be cited or relied on by a court or a party in any other action or proceeding." CAL. CT. R. 977(a) (Supp. 1994). One California Supreme Court Justice has written that depublication is generally ordered "because a majority of the justices consider the opinion to be wrong in some significant

ions may provide useful insights into the state of the law as well as being worthy of study in their own right.¹⁷⁷

PRINCIPLE 7: Scholars should consider unpublished and limited authority decisions on a case-by-case basis when they have been identified. In determining the treatment of such opinions, they should consider publication, citation, and distribution policies, together with local practice.

PRINCIPLE 8: Researchers should consider both limitation of authority and depublication when examining the impact of an opinion; the effect prior to the limitation or depublication may differ from the effect after the limitation or depublication.

5. Statutory Interpretation Cases

Statutes and statutory interpretation¹⁷⁸ exert influence on courts' decisions on common law rules; this influence may require some choices by researchers. For example, a court may interpret statutory language to provide a remedy similar to a common law remedy instead of adopting a common law rule. When the statutory language is clear, such an interpretation is not a common law

way, such that it would mislead the bench and bar if it remained as citable precedent." Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514-15 (1984).

177. Two recent empirical studies are, Dubois, *supra* note 175, and Uelmen, *supra* note 175.

178. Economic analysis of law has generally distinguished between analysis of common law and statutory law. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 523-36 (1992). Although this distinction has been criticized for failing to recognize the fundamental similarities between the processes which produce common law rules and those which produce statutes, see Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982), the institutional differences are significant for the researcher conducting an empirical investigation into the common law. To take an obvious example, there is no reason to expect that the terms of judges will affect a legislature's deliberation on a statute in the same way that the same terms will affect a judge's decision. Legislatures might regard a judiciary made up of judges with short terms as easier to control than one which is made up of judges with life tenure. This could affect the optimal degree of specificity in language used by the legislature. Judges with short terms might be more concerned with reappointment or reelection, but there is no reason to believe the magnitude of the effect would be the same and hence an empirical investigation would need to examine the two routes to a rule separately. An exception might be a competing risks model of adoption of a rule. I am unaware of any such study. Curran, *supra* note 2, examined the adoption of comparative negligence through both legislative and judicial means by treating both as identical. He reported that his initial investigation into the method of adoption was inconclusive. *Id.* at 311 n.35.

innovation. When, on the other hand, a court interprets vague language or strains to base the result on statutory interpretation, the result properly may be counted as a common law innovation.¹⁷⁹

179. An example of this is the interpretation of workers' compensation statutes on the issue of the existence of a remedy for discharge in retaliation for seeking benefits under the compensation scheme. Some such cases simply applied relatively clear statutory language to provide a remedy. See *Smith v. Piezo Technology and Professional Adm'rs*, 427 So. 2d 182 (Fla. 1983), where the court concluded that Florida Statute § 440.205 created a cause of action for a retaliatory discharge. *Id.* at 183. That section stated: "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." FLA. STAT. § 440.205 (1979). The only reason one might question whether such a claim was possible was that the statute did not specify a forum for resolving such claims or describe the relief possible. *Smith*, 427 So. 2d at 184 n.1. Recognizing that the statute clearly imposed a duty, the Florida Supreme Court had no difficulty finding an implied right of action. *Id.* at 184. This recognition was eased by the fact that § 440.205 was a response to *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89, 90 (Fla. Dist. Ct. App. 1978), which held that there was no such cause of action under the prior statute. See *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1330 n.1 (Fla. Dist. Ct. App. 1985).

Similarly, in *Henderson v. St. Louis Hous. Auth.*, 605 S.W.2d 800 (Mo. Ct. App. 1979), the statute explicitly permitted retaliatory discharge claims: "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer." *Id.* at 802-03 (quoting MO. REV. STAT. § 287.780 (Supp. 1975)). The recognition of such a cause of action should not count as an innovation. (Missouri amended the earlier version of this statute to provide a civil remedy in 1973.) See MO. ANN. STAT. § 287.780 (Vernon 1993).

In *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973), on the other hand, the Indiana Supreme Court held that discharging an employee for filing a workers' compensation claim was a "device" within the meaning of a workers' compensation statute provision, which read: "No contract or agreement, written or implied, no rule, regulation, or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act." *Id.* at 427-28 (emphasis added) (quoting IND. CODE § 40-1215 (1971)). The court held:

The Act creates a *duty* in the employer to compensate employees for work-related injuries (through insurance) and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation. . . .

. . . We believe the threat of discharge to be a "device" within the framework of [the statute], and hence, in clear contravention of public policy. . . .

. . . Retaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of

Courts may also attempt to cloak the innovation in terms of filling the gaps in statutory schemes.¹⁸⁰ In these cases the researcher will have to pierce the veil of the court's language to determine whether the result in question is truly a matter of interpreting the statute or whether it is a common law innovation.

A second problem arises when a common law remedy is tied indirectly to a statutory provision.¹⁸¹ Courts may use language

law. . . .

. . . . We agree with the Court of Appeals that, under ordinary circumstances, an employee at-will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule must be recognized.

Id. at 427-28. Thus, *Frampton* should count as an innovation since the court appears to be recognizing a general principle rather than simply applying a specific statutory provision.

There are several reasons for the distinction. The first is the unique history of workers' compensation statutes. ARTHUR LARSON & LEX K. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.20, at 2 (1994). Because they require employees to give up the chance for a large tort recovery to gain a (theoretically) swifter but (certainly) smaller recovery, the comprehensiveness of the scheme is critically important. If employers were able to defeat workers' compensation claims by simply threatening to fire employees who filed claims, employees would have neither the workers' compensation remedy nor the tort theories given up to gain the compensation scheme.

Second, firing an employee for filing a workers' compensation claim is a narrow class of behavior which is easily avoided by an employer. If the only effect of the case is to suggest that the court will not allow comprehensive social insurance programs to be defeated by unethical behavior, it has relatively minor consequences for most employers. (The constant stream of cases suggests underestimating employer stupidity may not be a serious problem. Even the unethical employer determined to retaliate against an injured employee ought, on a moment's reflection, to see the benefit of disguising the reason for the discharge.) If, on the other hand, the case signals a willingness to freely interpret statutory language which formerly bore no obvious relation to wrongful discharge law, then the signal indicates that employers must beware of broader changes in the law. An *ex post* confirmation of this approach lies in the scholarly treatment of *Frampton* as an innovation rather than as a simple application of a statute. See, e.g., Christopher L. Perrington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1600 (1994) (noting that *Frampton* was the first case to supplement the statutory remedy with a tort action, since allowing the employer to discharge the employee would subvert the statutory public policy).

180. In the wrongful discharge area, it is not uncommon to find courts rationalizing innovations by looking to the remedies provided workers under collective bargaining contracts or statutory schemes such as Title VII. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509 (N.J. 1980). ("The National Labor Relations Act and other labor legislation illustrate the governmental policy of preventing employees from using the right of discharge as a means of oppression. Consistent with this policy, many states have recognized the need to protect employees who are not parties to a collective bargaining agreement or other contract from abusive practices by the employer.") (citing Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV., 1404, 1418 (1967)).

181. For example, in the case of the public policy exceptions to the at-will rule, many

that implies that the rule being adopted is merely the fulfillment of an existing statutory policy. The researcher must therefore decide if there has been a common law innovation.¹⁸² This decision must rest on an interpretation of both the decision's language and the statutory provision. The legal change under study may be tied to the language of state statutes; these statutes may use different language to resolve the same issue.¹⁸³ Whenever conducting the analysis requires some aggregation, the researcher will have to make qualitative judgments about the statutes' similarities and differences to avoid losing any impact in a welter of statute-specific variables.

Finally, different courts may have different degrees of deference toward their legislatures.¹⁸⁴ Researchers should be especially

states have adopted exceptions which require plaintiffs to point to a statutory or constitutional provision as the source of the public policy. *See, e.g.,* *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989) ("discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law"). Other states have broader public policy exceptions which impose fewer restrictions. *See, e.g.,* *Pierce*, 417 A.2d at 152 (including administrative rules, regulations and decisions and some professional codes of ethics as sources of public policy).

182. An example here is *Petermann v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). The court simply asserted that:

Generally, such a relationship [employment contract without fixed duration] is terminable at the will of either party (Labor Code, §2922) for any reason whatsoever. However, the right to discharge an employee under such a contract may be limited by statute or by considerations of public policy.

Id. at 27 (emphasis added) (citations omitted). The last part of this claim is unsupported by citation to any authority, and the remainder of the opinion discusses whether perjury is an action prohibited by public policy and whether plaintiff had a claim for expulsion from the union. *Id.* at 27-29. What is remarkable about *Petermann* is that no court had ever made such a holding before and yet the court did not attempt to justify its conclusion. The issue of whether a court has the ability to limit at-will contracts in the same fashion as the legislature continues to be a major issue in many courts. *Compare* *Vigil v. Arzoia*, 699 P.2d 613, 619 (N.M. Ct. App. 1983) (allowing claim for discharge in retaliation for publicly opposing certain public expenditures, and rejecting claim that court should defer to legislature in modifying the at-will rule outside workers' compensation area), *rev'd*, 687 P.2d 1038 (N.M. 1984) with *Bottijliso v. Hutchison Fruit Co.*, 635 P.2d 992, 997-98 (N.M. Ct. App. 1981) (deferring to the legislature with respect to retaliation claim in workers' compensation area), *overruled by* *Michaels v. Anglo Am. Auto Actions, Inc.*, 689 P.2d 279 (N.M. 1994).

183. One might examine the adoption of retaliatory discharge causes of action under workers' compensation schemes. *See supra* note 179.

184. Compare the attitudes of the Montana and Georgia Supreme Courts toward their respective codified at-will rules. Montana has developed one of the most pro-plaintiff wrongful discharge doctrine with barely a mention of the code provisions, while Georgia has consistently deferred to the legislature. *See infra* Appendix B.

cautious in interpreting decisions in those states which have civil codes that purport to be substantive substitutes for the common law. During the nineteenth century California, the Dakotas, Georgia, Louisiana, and Montana all adopted substantive civil codes which were intended to supplant, in varying degrees, the common law.¹⁸⁵

PRINCIPLE 9: Researchers should not categorically reject statutory interpretation cases as sources of common law innovation. They must examine the content of each case carefully before counting or rejecting it.

6. Sources of Cases

There are two methods for locating cases. The first is to rely on secondary sources.¹⁸⁶ The second is to conduct independent legal research. The first is relatively inexpensive, but the potential for inaccuracy is high. When the secondary sources are primarily aimed at practicing lawyers, such as publications by the Bureau of National Affairs or the Practicing Law Institute, the criteria for selection of a case are not the same as an empirical researcher might use.¹⁸⁷ Even when the secondary sources are historically oriented, a researcher must carefully ensure that the criteria used are similar to those she wishes to employ. In general, there is no substitute for independent legal research. To facilitate independent evaluation of empirical work, researchers should provide, and jour-

185. See generally Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. (forthcoming 1995) [hereinafter Morriss, *Plenty of Laws*]; Andrew P. Morriss, *The Law and Economics of Employment At Will*, ch. 2 (1994) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) [hereinafter Morriss, *Law and Economics*] for a discussion of the employment at will provisions of these codes and a history of these codes, and Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17 (1990) for a thorough discussion of the theories of displacement in the California, North Dakota, South Dakota, and Montana codes.

186. This is the method used by Krueger. See Krueger, *supra* note 8, tbl. 1, at 649 (deriving figures from Bureau of National Affairs and Shepard, Heylman, and Duston).

187. The historical evolution of the doctrine is less important in these materials than the current state of the law. Thus the careful research necessary to find the original case is likely to be subordinated to the need to discuss the current contours of a course of action. There are also mistakes in these types of materials. For example, Krueger refers to *Staggs v. Blue Cross of Maryland*, 486 A.2d 798 (Md. Ct. Spec. App. 1985) but lists the date as 1987. Krueger, *supra* note 8, at 649. This appears to be a repeat of a typographical error in the *BNA Individual Employment Rights Manual* which incorrectly lists the date as 1987 rather than 1985. 9A BUREAU OF NATIONAL AFFAIRS, INDIVIDUAL EMPLOYMENT RIGHTS MANUAL 505:414 (1993).

nals should publish, complete citation lists.¹⁸⁸

PRINCIPLE 10: Researchers should perform independent legal research to discover the common law events.

PRINCIPLE 11: Researchers should publish complete citation lists and disclose all choices made.

7. Flip-Flops

Courts sometimes change their minds about doctrines. These changes may occur when a question finally reaches a higher court,¹⁸⁹ opinions change on a question,¹⁹⁰ or a court reinterprets its own precedents.¹⁹¹ Some projects will require that the models specified allow for the possibility of a doctrinal reversal.¹⁹² It is also important that reversals of doctrines be recognized as exactly that; researchers should not be deceived by a court's attempt to portray a rule change as simply a clarification.¹⁹³ In general, empirical work should focus on the contemporaneous view of a decision, not the *ex post* rationalization.¹⁹⁴

188. One might argue that providing a list of cases on request is adequate. It is not. Only a published list will enable a reader to determine whether to rely on the research. No one would consider publishing an empirical economics article without including both the source of the data and descriptive statistics. Including a citation list is a minimal cost in most instances. Krueger's paper, for example, relied on only 64 cases. Krueger, *supra* note 8, unpublished appendix (on file with author). The citation list of only case names, as in that paper, creates additional confusion. Only by examining the actual data set and conducting independent research (since the list does not reveal whether there is more than one opinion in any particular case) can a reader determine which opinion was relied upon for Connecticut's implied covenant or Mississippi's public policy exceptions. *See infra* notes 381-88, 475-76 and accompanying text. Where both intermediate and final opinions are published, as in those cases, the full citation is necessary to eliminate confusion. Ideally an appendix which briefly discloses choices made, possible in those journals such as law reviews which have relatively high page limits, would be desirable.

189. *See, e.g.,* *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

190. *See, e.g.,* *Vigil v. Arzoia*, 699 P.2d 613 (N.M. Ct. App. 1983) (modifying *Bottijliso v. Hutchison Fruit Co.*, 635 P.2d 992 (N.M. Ct. App. 1981)).

191. *See, e.g.,* *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980). Counting *Erie* guesses and intermediate court opinions will increase the probability of a reversal. *See, e.g.,* *Samples v. Hall of Miss., Inc.*, 673 F. Supp. 1413, 1415 (N.D. Miss. 1987) (interpreting Mississippi state law); *Foley*, 765 P.2d 373, 401-02 (reversing the intermediate appellate court in part).

192. Dertouzos and Karoly specifically address this. *See* DERTOUZOS & KAROLY, *supra* note 2, at 16.

193. *See, e.g.,* *Dorr*, 414 A.2d at 1274 and discussion *supra* note 86.

194. Interpretations of a case by other courts, law review articles, and other legal literature provide valuable indications of the contemporaneous view of an opinion. *See supra* note 81 on interpretation of *Monge*.

PRINCIPLE 12: When appropriate, researchers should focus on the contemporaneous view of an opinion rather than on a court's *ex post* rationalization.

PRINCIPLE 13: Model specifications should allow for reversals.

8. Dismissals and Summary Judgments

When the plaintiff seeks recovery under a new cause of action, it is not uncommon for the trial court to dismiss the plaintiff's case¹⁹⁵ or to grant summary judgment against the plaintiff. An appellate court may then affirm the dismissal or summary judgment, sometimes on slightly different grounds. These opinions present a difficult choice for the researcher. The appellate court may address the claim as follows: "B does not have a claim because Rule X applies. Even if Rule X applied, however, this claimant does not have a claim under Rule X, since B has received all the benefit he might obtain under Rule X."¹⁹⁶ Scholars should

195. While there are no statistics on use of state procedures to accomplish dismissal, the analogous federal procedural device, Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, has been studied. Three studies looked at samples of cases drawn from selected federal district courts and found between 6 and 12% of cases had motions to dismiss and 4 to 8% of cases had such motions granted. THOMAS E. WILLGING, *USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS* 6-8, Federal Judicial Center Staff Paper (1989). As these statistics indicate, relatively few federal cases are disposed of through motions to dismiss. The importance of these types of motions will vary with the subject matter. In the case of states which have not yet adopted a common law exception to the at-will rule, motions to dismiss, based on my reading of thousands of employment cases, appear to have been more important than the federal (12)(b)(6) motions are today. This is to be expected since a broad gatekeeper rule such as the at-will rule would preclude most discharge-related claims. A tort suit, on the other hand, based on a well-established course of action would be more likely to turn on the factual dispute rather than the legal validity of the claim. One consequence for empirical researchers is that challenges to rules like the at-will rule are likely to rise through the legal system more rapidly since courts are more likely to dismiss them at the trial level. Although opinions concerning dismissal appear more quickly, final opinions resolving the existence of a claim may be delayed by the intermediate appellate trip. If the claim is not dismissed, a potentially more conclusive final appellate opinion will also be delayed while the case is tried below. The researcher's decision concerning how to handle these types of opinions can therefore have a substantial impact on the timing of the common law event. This highlights the need for a consistent approach to the issues surrounding dating.

196. See, e.g., *Knox v. American Sterilizer Co.*, 117 L.R.R.M. (BNA) 2341, 2342 (M.D. Ala. 1984) (holding employee had received all of the benefits promised under handbook prior to adoption of an implied contract exception in Alabama).

distinguish these cases from cases which potentially recognize a rule in other forms of dicta. In dismissal or summary judgment cases, the court is often simply being careful. If a plaintiff's claim fails even under the most favorable interpretation of a rule and the facts, there is no need to address the issue of whether the rule actually applies and the court has avoided a potential legal mistake. Holding that a claim has failed on the facts is a cheap form of insurance against reversal on the merits.¹⁹⁷ Particularly in the case of decisions by intermediate appellate courts these decisions should not be counted as innovations. By contrast, a court sends a different signal when it goes out of its way to acknowledge that different facts might lead to a new rule.¹⁹⁸

PRINCIPLE 14: Dicta in opinions dismissing causes of action or granting summary judgment against proponents of a new rule should be counted as establishing a rule only when the dicta directly indicates a willingness to adopt a new rule in a future case.

9. Denials

Courts sometimes reject a doctrinal change.¹⁹⁹ The rejection may stand for a lengthy period or the court may overturn it soon thereafter. It may be a simple rejection of a claim or it may be a firm endorsement of deference to the legislature in a particular area.²⁰⁰ How should a researcher approach these opinions? One

197. It is cheap because factual determination by trial courts are reviewed with a much greater level of deference than legal determinations. See FED. R. CIV. P. 52(a) ("clearly erroneous" standard of review applies to factual determinations).

198. See, e.g., *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). The dicta in *Geary* noted that:

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

Id. at 180. The employer won in *Geary* based on the particular facts: the employer successfully argued that the employee was discharged for failing to follow company procedure when making his complaint about the safety of the product, not because he complained. *Id.* at 179-80. The clear message of *Geary* was that the at-will rule was no longer absolute.

199. See, e.g., *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980); *Ochab v. Morrison, Inc.*, 517 So. 2d 763, 763-64 (Fla. Dist. Ct. App. 1987); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1330 (Fla. Dist. Ct. App. 1985).

200. Compare *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814, 814 (Ala. 1984) (four of nine justices dissent and call for public policy exception) with *Goodroe v. Georgia*

possibility is to model the outcome as a choice between two alternatives, although this may not always be possible. These decisions have important information, the loss of which would be especially undesirable for models of the behavior of a court. A court which has just issued a ringing endorsement of Rule \bar{X} , for example, is far less likely to adopt Rule X the following day. Moreover, attorneys and litigants are less likely to present cases raising an issue if the court has just rejected a rule change.²⁰¹

PRINCIPLE 15: Models of doctrinal change should include the possibility of rejection of the change.

10. *Ex Post* Verification

How much attention should researchers pay to courts' own assessments of their precedents? As demonstrated in the discussion of the habeas "new rule" cases²⁰² and of the *Monge-Dorr* history,²⁰³ courts have difficulty agreeing amongst themselves about the meaning of their decisions, and their assessment of opinions should not be binding on researchers. At the same time, courts' assessments of the meaning of precedent provide valuable information. If a case is never cited after it is issued, that is at least some indication that other courts did not regard it as breaking important new ground. If another case is simply cited more, however, it may be that the other case is from a higher court, is better written, contains facts more closely analogous to the current case, is written by a particularly well-regarded judge, or provides a more complete analysis of the cause of action. Lack of extensive citation is not necessarily fatal to a case's claim on history, however.²⁰⁴

Power Co., 251 S.E.2d 51, 52 (Ga. Ct. App. 1978) (declaring unanimously that "there is no room for this exception in Georgia as [the at-will] rule is statutory and the statute, Code § 66-101, does not encompass the exception").

201. FED. R. CIV. P. 11 and its state analogues require a good faith belief that there is a cause of action before filing suit, a standard which is difficult to meet if the state appellate courts have just decisively rejected a similar claim. Priest's approach, described in note 6, *supra*, is one way to handle this problem.

202. See *supra* notes 13-62 and accompanying text.

203. See *supra* note 81.

204. See Landes & Posner, *supra* note 6, at 263-67 for a discussion of precedent as capital and an empirical examination of citation practice. In the at-will area, cases establishing the at-will rule in Alabama are a good example of the changing pattern of citation. Modern Alabama cases generally cite a recent opinion such as *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814 (Ala. 1984), for the rule. See, e.g., *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987). Pre-*Meeks* Alabama cases cited earlier cases, and so on, back to the original opinion adopting the rule in 1891. See *Howard v.*

PRINCIPLE 16: Citation history is only one factor in deciding whether or not to count a case.

PRINCIPLE 17: Researchers must do more than trace the courts' own dating of legal changes. They must develop theoretically sound methods.

C. *The Choice of Structure*

Empirical researchers must choose a method of categorizing the cases in order to be able to fit the common law into a quantitative model. The three analyses discussed below used three different ways to categorize the common law: (1) by doctrinal base;²⁰⁵ (2) by quantity;²⁰⁶ and (3) by remedy.²⁰⁷ Which categorization is appropriate will depend on the question asked. It will also depend on the hypothesis concerning the method through which the common law is thought to influence the dependent variable (or, if the change is the dependent variable, be influenced by the independent variables.)

An example of a different resolution of this issue than that used in this Article was the classification Dertouzos and Karoly used in their examination of the growth of the modern common law exceptions.²⁰⁸ Using the dates of adoption, they estimated a

East Tenn., Va. & Ga. R.R. Co., 8 So. 868, 869 (Ala. 1891).

205. Similar to the author's analysis, Krueger, *supra* note 8, at 655, categorizes data according to its doctrinal base in specifications 1, 2, and 3 as displayed in Krueger's tbl. 4.

206. *Id.* at 655, 656 (using quantity as part of specifications 4, 5, and 6).

207. Dertouzos and Karoly developed a two-way characterization of remedies based on either contract or tort law. DERTOUZOS & KAROLY, *supra* note 2, at 23-26.

208. They examined what they termed "the supply and demand for new legal doctrines." *Id.* at 18. Unfortunately, data unavailability meant that no sensitivity testing of this model was possible. They explained their approach as follows:

Demand for new legal doctrines is determined by those who would benefit from the legal changes, for example nonunionized or unemployed workers. Supply is determined by those who would bear the costs of the legal changes, such as employers or the judiciary. Some supply and demand factors may be operating at the national level and may affect all states equally. Changes in these aggregate variables over time can explain the increased recognition of the wrongful-termination doctrines in the 1980s. Other supply or demand factors may vary substantially *across* states and over time. These factors may explain the variation *across* states in the pattern and timing of adoption of the new legal doctrines.

Id. at 18-19 (emphasis in original). Their empirical model included several types of variables: (i) declining unionization; (ii) business cycle (unemployment rate); (iii) increased litigiousness (percent change in lawyers per capita); (iv) increased awareness of workers'

model of the probability of adoption of the various doctrines and used it to examine the effect of various factors.²⁰⁹ In doing so, Dertouzos and Karoly used two slightly different methods of characterizing legal doctrines, both of which differ from those Krueger and I used. In the method most similar to the other analyses, they categorized cases as one of the following: (1) narrow public policy;

rights (year dummies); (v) ideological factors (existence of right to work law, percent unionization); and (vi) other costs (percent of geographic neighbors that have adopted doctrine). *Id.* at 19-21.

209. Formally, the probability of having doctrine d in state s at time t for years 1980-1987 is:

$$\log \left[\frac{p_{dst}}{1 - p_{dst}} \right] = X_{st} \mathbf{B} + Y_s \gamma + Z_t \alpha + \mu_{dst}$$

where p_{dst} is the probability, X_{st} is a vector of time-varying state-specific variables, Y_s is a vector of time-invariant, state-specific variables, Z_t is a vector of time-varying aggregate variables, and μ_{dst} is a random disturbance term. *Id.* at 23. The problem of how to model courts' behavior is a difficult one for which there is currently no satisfactory answer. Dertouzos and Karoly's approach, however, has a number of implications which suggest it is incorrect. Although courts undoubtedly "supply" legal doctrines, these doctrines are not separate goods. They are joint products with the other output which the same courts simultaneously supply: decisions in particular cases. The consumers of legal doctrines also "demand" changes at times. Consumers' general demands are also bound up with their demands in particular cases. When people go to court they want two things: justice and victory. The private rank ordering of these two goals does not always favor the social good.

In Dertouzos and Karoly's model, courts respond to the "demand" for new doctrines by changing the common law. *Id.* at 18-19. Political events from judicial elections to presidential elections clearly influence the courts. How these events pressure judges in particular cases is difficult to model. There are certainly reasons why a state with right to work laws, for example, might have a judiciary more or less favorable to developing a common law of wrongful discharge, but the effects are complex and difficult to specify. Are right to work laws simply a proxy for an underlying political climate which is "pro-employer," or does the weakness of the union movement make judges more inclined to favor alternative legal doctrines which benefit nonunion employees? Or might a "pro-employer" judge see wrongful discharge remedies as a method of making unions less attractive? See Susan L. Catler, *The Case Against Proposals to Eliminate the Employment At Will Rule*, 5 INDUS. REL. L.J. 471, 494 (1983) (opposing common law exceptions to the at-will rule because they will lessen the demand for unionization). Without an underlying model of how judges decide cases, it is hard to predict how political variables will affect their decisions.

Further, Dertouzos and Karoly's model excludes court structure itself. State judges in the United States are both elected and appointed, serve limited and unlimited terms, are chosen in partisan elections and in nonpartisan elections, and so forth. Regardless of the political variable under consideration, one would expect that the method of judicial selection and system of tenure would lead to different types of influence. See Morris, *Exploding Myths*, *supra* note 132, at 713-15 (describing interstate differences among courts as a factor in their decision-making processes).

(2) implied contract or good faith contract exception; and (3) broad public policy or good faith tort exception.²¹⁰ They also used a two-way classification, based on whether the remedy was tort or contract based.²¹¹

The time period used as a basis for the study is a problem which has a more generalizable answer. Krueger used a time unit of one year for his study of the influence of common law decisions on the introduction of bills providing statutory remedies.²¹² However, courts' decisions are issued during a year at a specific point in time in a year. By treating all decisions within a year as simultaneous, Krueger lost information on the time of adoption. This information was particularly important in his case since many state legislatures meet only for part of a year,²¹³ and so the timing of the decision would be even more likely to affect whether a decision would influence those legislatures.²¹⁴ Smaller time units, when possible, thus have significant advantages.

The fact that Louisiana's unusual legal system contains more elements of a civil law system than other states' suggests that it should be excluded from the analysis. Similarly, the fact that Georgia has codified the at-will rule,²¹⁵ and that its courts give great deference to that legislative judgment,²¹⁶ suggests, in my judgment, that its inclusion in Krueger's model was inappropriate. The failure to adopt an exception in Georgia would not indicate the same thing as the failure to adopt in, for example, Montana. Actually reading cases is the only way to discover these types of peculiarities, since both Montana and Georgia have codified at-will rules, but Montana's courts ignored their code provision while developing one of the most pro-employee set of remedies for wrongful discharge among the states.²¹⁷

Structural problems in analyzing legal institutions are not limit-

210. DERTOUZOS & KAROLY, *supra* note 2, at 21.

211. *Id.*

212. Krueger, *supra* note 8, at 856-57 & tbl. 5.

213. *See infra* note 218.

214. Krueger makes some accommodation for time lag, yet this does not solve the problem because opinions may still lag past the point at which legislatures have stopped meeting. Krueger, *supra* note 8, at 856-57 & tbl. 5.

215. *See, e.g.,* Garmon v. Health Group of Atlanta, Inc., 359 S.E.2d 450, 452 (Ga. Ct. App. 1987) (rejecting discharged employee's request to alter Georgia's legislative pronouncements regarding employment discharges stating that "[t]his is a matter of public policy, within the legislative arena").

216. *See* Morriss, *Law and Economics*, *supra* note 185, at ch. 2.

217. *See* Morriss, *Exploding Myths*, *supra* note 132.

ed to the common law, of course. For example, although Krueger's paper noted that some state legislatures do not meet annually, his data included observations for years in which state legislatures did not meet.²¹⁸ Since the probability of a bill's being introduced in these state legislatures in years in which the legislature is not in session is virtually zero,²¹⁹ the thirty-six observations for those states in the appropriate years should be deleted. Close attention to such institutional details is necessary to make empirical work credible.

PRINCIPLE 18: Researchers should choose an analytical structure for categorizing the law which reflects the mechanism through which the law is hypothesized to influence or be influenced by the other variables as well as the institutional environment being studied.

III. CASE STUDIES OF THE DECLINE OF EMPLOYMENT-AT-WILL

Having established the foregoing principles theoretically, I now move to their application to the area of employment-at-will. The erosion of the employment-at-will rule presents an unusual natural experiment.²²⁰ Not only has the at-will rule been in place since

218. Seven state legislatures meet only biannually: Arkansas, Kentucky, Montana, Nevada, North Dakota, Oregon, and Texas. All of these legislatures but Kentucky meet only in odd numbered years. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 137-38 (1992).

219. The state legislature could, of course, be called into special session to consider an agenda which included unjust dismissal legislation. *Id.* None of the state-years affected, however, is listed by Krueger as a year in which such legislation was introduced. Krueger, *supra* note 8, tbl. 2, at 650.

220. These developments in the law are themselves interesting. An extensive legal literature critical of the at-will rule exists. This literature has influenced courts to alter the rule and adopt these exceptions. Almost every opinion adopting an exception cites the critical literature. Most also repeat arguments made by the critics, sometimes without attribution. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509 (N.J. 1980), where the court made, but failed to cite, essentially the argument made in FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1954) that

[w]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Prof. Lawrence Blades quoted this argument in an important 1967 article critical of employment-at-will and from there it found its way into many judicial opinions and law review notes. See Blades, *supra* note 180, at 1404. Much of this success appears to be

the early part of this century in every jurisdiction in the United States, but the common law has evolved toward relatively uniform alternatives.²²¹ I analyze the effects of those changes on the duration of employment using the methodology described in the previous section. Most importantly for methodological purposes, other researchers have conducted several analyses of the decline of employment-at-will in which they have approached the dating of common law changes differently.²²² This presents a unique opportunity to examine the practical consequences of the assumptions about changes in the law necessary to empirical research on the common law.

Since the end of the nineteenth century, the default rule for the interpretation of indefinite employment contracts in the United States has been employment-at-will.²²³ The rule's operation is quite simple: either party can end the contract at any time without liability.²²⁴ The most important legal consequence of this rule is that discharged at-will employees could not sue their employers for wrongful discharge.²²⁵

The development of the modern common law exceptions to the rule began in 1959, when an intermediate appellate court in California allowed an employee of the Teamsters union to bring a claim against his employer for wrongful discharge despite his at-

due to the claims made in this literature that employers routinely discharge at-will employees for "bad reasons" and that most, if not all, of these discharges would be prevented by adopting legal modifications of employment-at-will. See, e.g., Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 48 (1979); see generally Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983). Given the variation across states and across time in adopting these exceptions, it would be interesting to discover whether the critics' claims have been proven correct.

221. See *infra* notes 226-34 (discussing the different types of exceptions).

222. See generally DERTOUZOS & KAROLY, *supra* note 2; Krueger, *supra* note 8.

223. See Morriss, *Exploding Myths*, *supra* note 132, at 683-89 (providing more details about the rule's history).

224. Employers and employees are, of course, free to contract around the rule, to make definite term contracts or indefinite contracts which restrict either party's ability to terminate the contract. Prominent examples of the former are professional athletes with definite term contracts, while two examples of the latter are teachers and university faculty with tenure and employees covered by collective bargaining agreements.

225. Some commentators have argued that employees systematically misunderstood their employers' obligations under indefinite contracts. See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1831 (1980). Given the clarity and brevity of the at-will rule, however, it is difficult to imagine that such a systematic misunderstanding could have persisted since the end of the 19th century.

will status.²²⁶ The court allowed the claim because the employee alleged that he was discharged for refusing to commit perjury.²²⁷ The court held that

in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law The public policy of this state . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury.²²⁸

The significance of *Petermann* was not that employers could not fire employees who refused to commit perjury, a relatively rare occurrence, but that for the first time at-will employees could frame a cause of action for their discharge. After *Petermann*, commentators began to call for changes in the at-will rule.²²⁹ In the 1970s state courts began in earnest to modify the at-will rule, and by the mid-1980s three theoretically distinct approaches had developed: public policy exceptions, implied contract exceptions, and actions based on the implied covenant of good faith and fair dealing.²³⁰

Most states have adopted public policy exceptions similar to *Petermann*.²³¹ Many states adopted implied contract exceptions to the rule, allowing claims based on statements made by employers either orally or in writing which implied restrictions on the

226. See *Petermann v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

227. *Id.*

228. *Id.* at 27.

229. The most influential early criticism of the at-will rule has been by Lawrence E. Blades, see *supra* note 180.

230. See *infra* Appendix B (detailing the exceptions for various states).

231. The primary difference among them is how broadly the courts defined the public policy. Some states require the public policy to be defined by statute or constitutional provision, while others take a broader view. Nebraska, for example, requires that a specific statute or constitutional provision be the source of the public policy. See *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 757 (Neb. 1988). Utah, on the other hand, allows a much looser definition of public policy. See *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1043 (Utah 1989) (allowing judicial decisions to be a source of substantial principles of public policy in areas which the legislature has not spoken).

employer's ability to discharge.²³² Finally, some states allowed a cause of action for breach of the implied covenant of good faith and fair dealing.²³³ Unlike implied contract claims, these claims rest on a promise implied by law, and thus represent a much broader potential claim.²³⁴

The development of the modern exceptions has been dated for three empirical projects. Each employed somewhat different methodologies. My examination applied the principles developed in this paper; Dertouzos and Karoly made different choices; and Krueger relied entirely on secondary sources. Not surprisingly these methods produced significantly different datings. Tables 5 to 7 contain the datings and Tables 8 and 9 show the correlations both among and between methods for particular exceptions for the period 1976-89, treating each month as an observation. Figures 1 to 3 present the differences in dates graphically. As can be seen from these tables, the three approaches produced quite different results.

232. Again, there are differences among states in the level of specificity required to make a statement enforceable. In Alabama, for example, the courts recognized the possibility that there might be an implied term to a contract before they recognized other implied limitations on the right to discharge. *See, e.g.,* *Cunningham v. Etowah Quality of Life Council*, 484 So. 2d 1075 (Ala. 1986). Other differences exist among states over whether employers can disclaim the statements. *See, e.g.,* *Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 311 (Mich. App. 1981) (written disclaimer effective against claim based on employee handbook but not against oral statement by supervisor).

233. *See infra* Appendix B (detailing the exceptions in various states).

234. *See, e.g.,* *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 728 (Cal. Ct. App. 1980) ("The duty which arises from the covenant of good faith and fair dealing is *unconditional* and *independent* in nature; it is not controlled by events in the same manner as conditions precedent or subsequent."). *Cleary's* allowance of tort damages was later disapproved. *See* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 n.42 (Cal. 1988); *see also* *infra* notes 359-61 and accompanying text. Again there is significant variation among states, with some construing the claim in tort (which carries with it much greater damages) and some in contract. Between the *Cleary* decision on October 29, 1980, and the *Foley* decision on December 29, 1988, for example, tort damages for breach of the implied covenant were available in California. Since *Foley*, only contract damages are available. *See infra* notes 359-61 and accompanying text.

Table 4 Motions to Dismiss

	1975 Cases N = 3,114		1978 Cases N = 809		1988 Cases N = 640	
	Motions	Cases*	Motions	Cases*	Motions	Cases*
Total in sample	582	462 (15%)	98	79 (10%)	103	81 (13%)
Total rulings	449	368 (12%)	55	49 (6%)	86	67 (10%)
Total granted	292	259 (8%)	32	29 (4%)	45	37 (6%)
Total dispositions	--	186 (6%)	--	9 (1%)	36	19 (3%)

*Cases with motions filed.

Source: THOMAS E. WILLING, *USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS*, Federal Judicial Center Staff Paper (1989), Tables 1 (1975, reporting results from P. Connolly & P. Lombard, *Judicial Controls and the Civil Litigative Process: Motions* (Federal Judicial Center 1980)); 2 (1978, reporting results from the Civil Litigation Research Project); and 3 (1988, reporting original data).

Table 5 Public Policy

State	Morriss	Krueger	RAND
Alaska	2/21/86		2/21/86
Arizona	6/17/85	6/17/85	6/17/85
Arkansas	3/24/80	9/21/82	3/24/80
California	9/30/59	6/2/80	9/30/59
Colorado	9/18/85		7/1/88
Connecticut	1/22/80	1/22/80	1/22/80
Hawaii	10/28/82	10/28/82	10/28/82
Idaho	4/21/77	4/28/85	4/21/77
Illinois	12/4/78	4/17/81	12/4/78
Indiana	5/1/73	12/30/80	5/1/73
Iowa	7/31/85		7/31/85
Kansas	6/19/81	6/19/81	6/19/81
Kentucky	11/23/83	11/23/83	11/23/83
Maryland	7/16/81	7/16/81	7/16/81
Massachusetts	5/28/80	2/18/82	2/18/82
Michigan	6/24/76	6/24/76	6/24/76
Minnesota	11/18/86	11/18/86	11/18/86
Mississippi	7/17/87		
Missouri	11/5/85	12/26/79	11/5/85
Montana	1/30/80	1/30/80	1/30/80
Nebraska	11/25/87		11/25/87
Nevada	1/25/84	1/25/84	1/25/84
New Hampshire	2/28/74	2/28/74	2/28/74
New Jersey	7/28/80	7/28/80	7/28/80
New Mexico	7/5/83		7/5/83
North Carolina	5/7/85	5/7/85	5/7/85
North Dakota	11/19/87	11/19/87	11/19/87
New York			7/17/78
Ohio	2/11/85		2/11/85
Oklahoma	2/7/89		2/7/89
Oregon	6/12/75	6/12/75	6/12/75
Pennsylvania	3/25/74	4/28/78	4/28/78
Rhode Island			4/7/88
South Carolina	11/18/85	11/18/85	11/18/85
South Dakota	12/7/88		1/4/84
Tennessee	8/20/84	7/26/85	8/20/84
Texas	6/7/84	4/3/85	6/7/84
Utah	3/20/89		3/20/89
Vermont	9/26/86	9/26/86	11/5/79
Virginia	6/14/85	6/14/85	6/14/85
Washington	7/5/84	7/5/84	8/18/77
West Virginia	7/14/78	7/14/78	7/14/78
Wisconsin	1/28/80	1/28/80	7/1/83
Wyoming	7/5/89		5/2/85

Note: There is no applicable data for states not listed.

Table 6 Implied Contract

State	Morriss	Krueger	RAND
Alabama	7/10/87	8/14/84	7/10/87
Alaska	5/27/83	5/27/83	5/27/83
Arizona	6/14/83	4/25/84	4/25/84
Arkansas	6/4/84	4/1/85	11/22/82
California	2/6/76	2/6/76	3/31/72
Colorado	10/18/83	6/14/84	6/14/84
Connecticut	10/1/85	2/3/87	7/3/84
Hawaii	8/26/86		8/26/86
Idaho	4/21/77	4/21/77	4/21/77
Illinois	12/20/74	7/22/86	1/30/87
Indiana	8/20/87		8/20/87
Iowa	11/25/87		11/25/87
Kansas	8/2/84	8/2/84	8/2/84
Kentucky	8/31/83		
Maine	11/2/77	11/2/77	12/31/84
Maryland	1/14/85	1/14/87	1/14/85
Massachusetts	5/16/88		7/14/88
Michigan	6/10/80	6/10/80	6/10/80
Minnesota	4/29/83	4/29/83	4/29/83
Missouri	1/18/83		1/18/83
Montana	7/1/87	1/5/82	7/1/87
Nebraska	11/18/83		11/18/83
Nevada	8/31/83	2/27/86	8/31/83
New Hampshire	8/5/88		
New Jersey	5/9/85	5/9/85	5/9/85
New Mexico	2/1/80	2/1/80	2/1/80
New York	11/18/82	11/18/82	11/18/82
North Dakota	2/23/84		12/16/86
Ohio	3/21/82	3/30/84	3/21/82
Oklahoma	12/28/76	12/28/76	6/9/87
Oregon	3/28/78	2/20/79	3/28/78
South Carolina	6/8/87		6/8/87
South Dakota	4/13/83	4/13/83	4/13/83
Tennessee	11/5/81		
Texas	4/11/85		
Utah	5/13/86		
Vermont	8/9/85	8/9/85	7/18/86
Virginia	9/9/88		
Washington	8/18/77	11/9/78	8/18/77
West Virginia	4/4/86	4/4/86	4/4/86
Wisconsin	6/5/85	6/5/85	6/5/85

Note: There is no applicable data for states not listed.

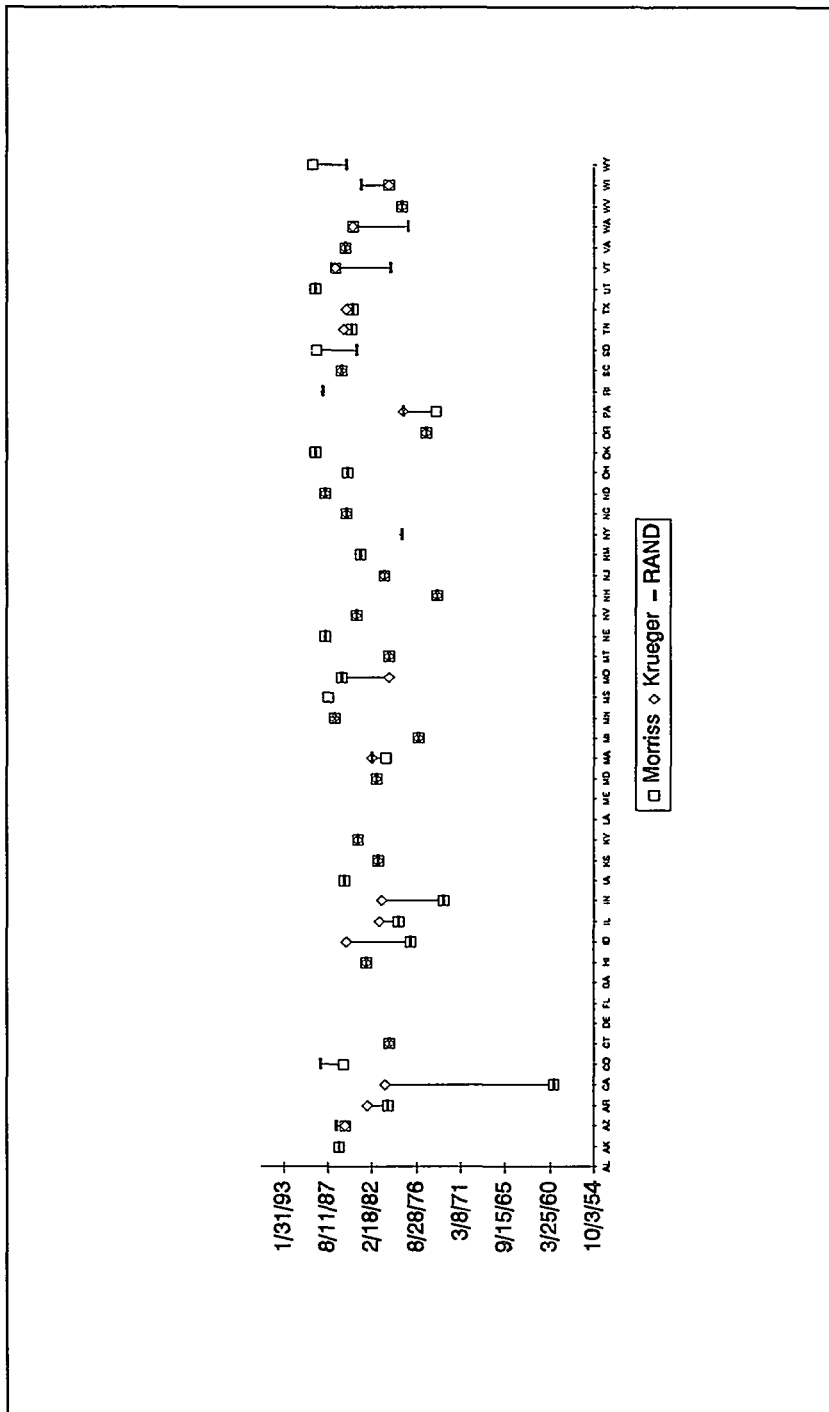


FIGURE 1 Public Policy

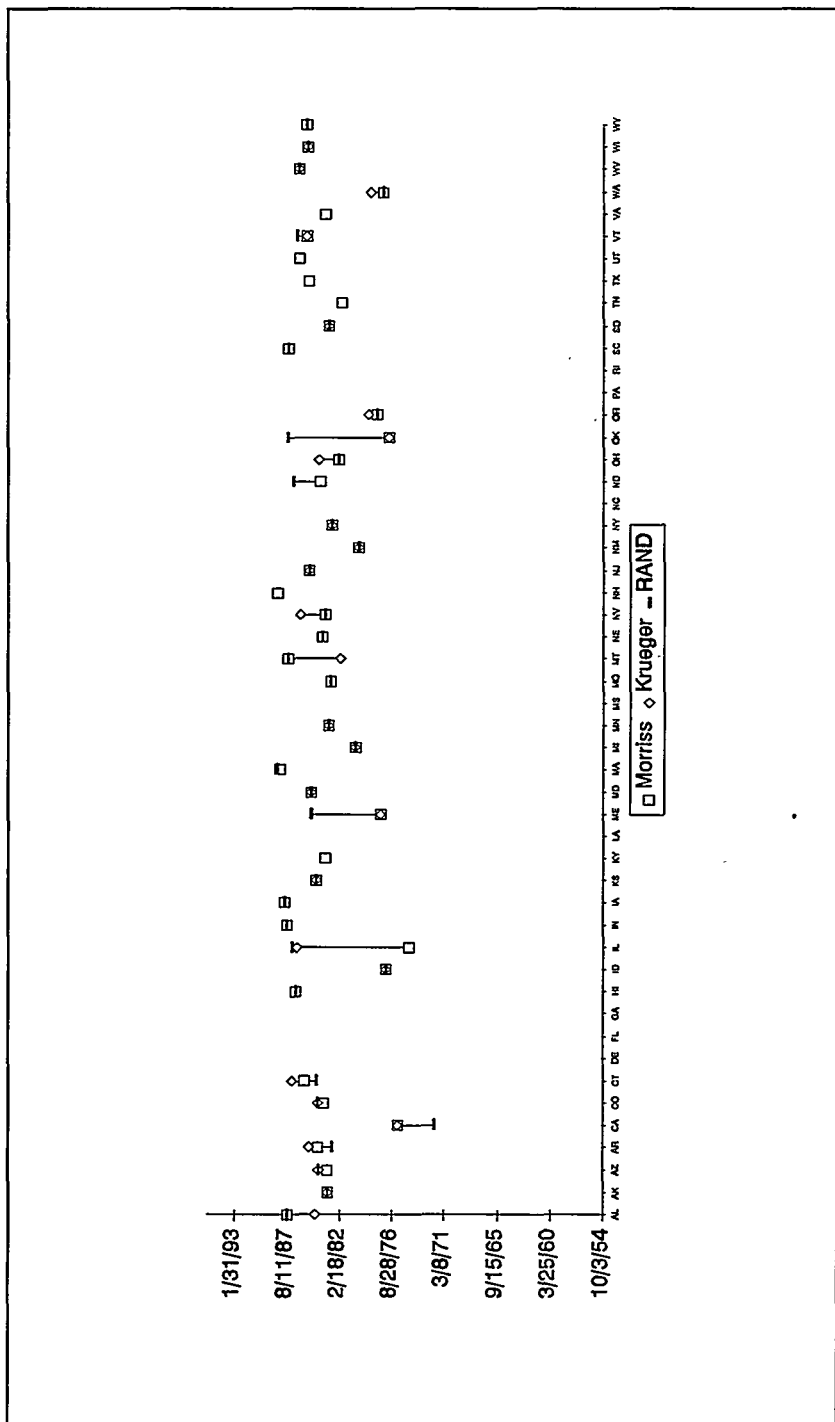


FIGURE 2 Implied Contract

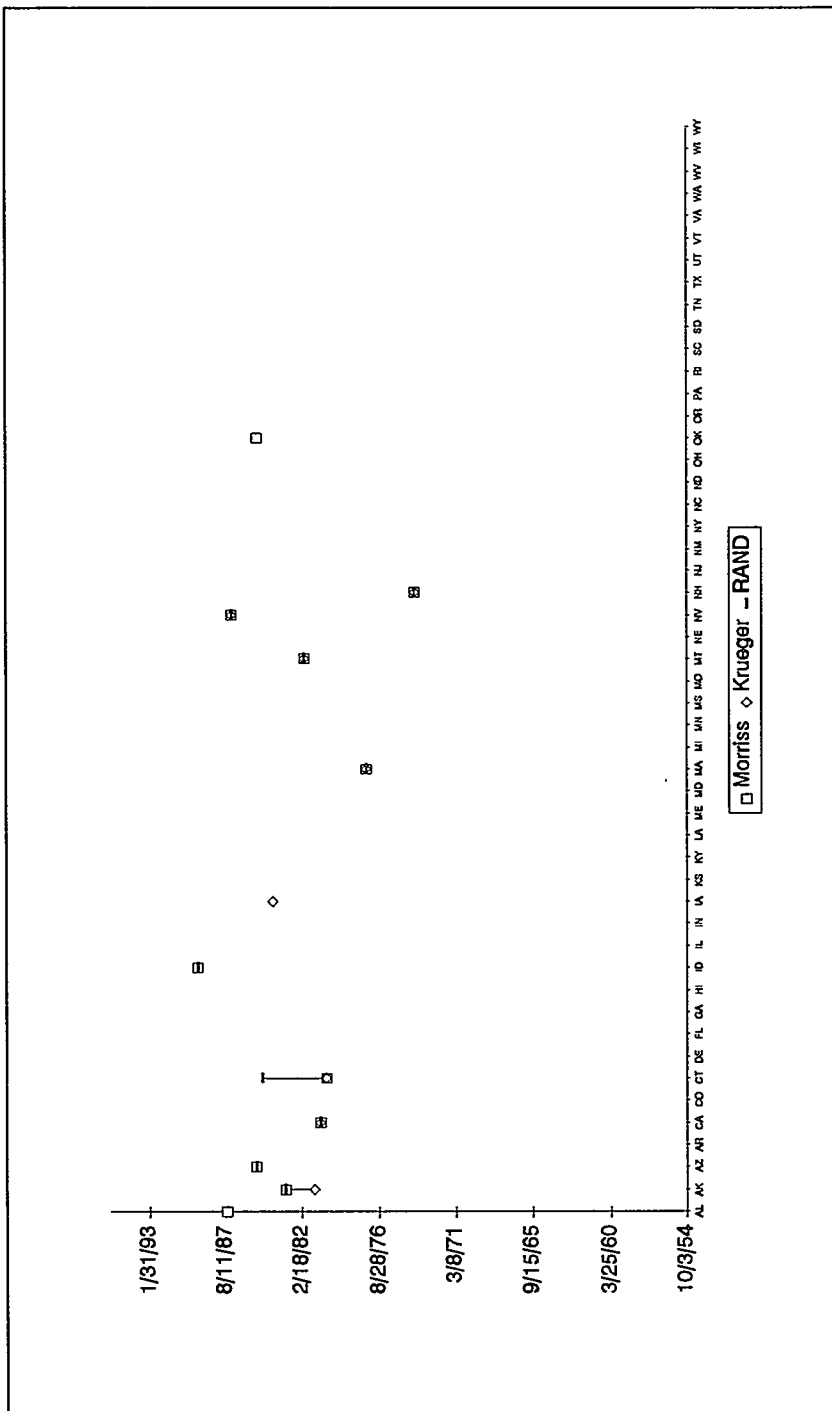


FIGURE 3 Implied Covenant

Table 7 Implied Covenant

State	Morriss	Krueger	RAND
Alabama	7/10/87		
Alaska	5/20/83	5/1/81	5/20/83
Arizona	6/17/85		6/17/85
California	10/29/80	10/29/80	10/29/80
Connecticut	6/10/80	6/10/80	1/16/85
Idaho	8/8/89		8/8/89
Iowa		3/16/84	
Massachusetts	7/20/77	7/20/77	7/20/77
Montana	1/5/82	1/5/82	1/5/82
Nevada	2/24/87	2/24/87	2/24/87
New Hampshire	2/28/74		2/28/74
Oklahoma	5/21/85		

Note: There is no applicable data for states not listed.

Table 8 Correlations Within Methods and Between Exceptions

Exceptions	Study	Exceptions	
		Public Policy	Implied Contract
Implied Contract	Morriss	72.54	—
	Krueger	69.04	—
	RAND	77.10	—
Implied Covenant	Morriss	69.91	67.70
	Krueger	72.04	77.86
	RAND	68.41	75.12

Source: calculated from case assignments in Appendix B.

Table 9 Correlations Between Methods and Within Exceptions

Exceptions / Study		Krueger	RAND
Public Policy	Morriss	90.37	93.50
	Krueger	—	87.37
Implied Contract	Morriss	87.61	88.76
	Krueger	—	90.77
Implied Covenant	Morriss	96.69	98.03
	Krueger	—	96.16

Source: calculated from case assignments in Appendix B.

A. *The Probability of Job Termination and Wrongful Discharge*

Turning to the specific case studies, I begin with an original investigation into the impact of the common law changes. Many of the legal arguments against employment-at-will have focused on the consequences for individuals of job loss for "bad reasons."²³⁵ A natural avenue of investigation is the impact the law has had on the probability that jobs end. If the critics are correct that (a) there are a significant number of discharges for "bad reasons" and (b) changing the at-will rule will reduce or eliminate these discharges, then changes in the legal rules should significantly affect the probability of discharge.

Examining the impact of the law on the probability of job termination for individuals has several advantages over using aggregate measures such as state unemployment data. First, aggregate approaches generally rely on yearly data, while the legal changes occur at specific points during a given year. An approach focused on individuals thus allows for more precise control for the changes in the legal environment. Second, aggregate employment data is far more sensitive than the end of individual's employment to other changes in a state's legal environment outside of employment law.²³⁶ If those changes are both imperfectly controlled for and correlated with the adoption of exceptions to employment-at-will,²³⁷ then the aggregate approach may overestimate the influence of the changes in the at-will rule. Unfortunately, the individual approach also has a significant disadvantage, which is that there are no available data limited to firings.²³⁸ My approach uses the probability of a job's ending from all causes as the dependent variable and explores through a logistic model whether changes in the legal environment affect that probability.²³⁹

235. See, e.g., Blades, *supra* note 180, at 1406-15; Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 481-83 (1976).

236. A state's decisions on tax levels, for example, would be likely to affect aggregate employment significantly. Similarly, state-mandated benefits are generally thought to decrease employment.

237. It is quite likely that there would be some correlation in types of changes. Many state courts have reputations as "pro-consumer" or "pro-plaintiff" and could be expected to adopt rules in many areas consistent with a general philosophy. See, e.g., Canon & Baum, *supra* note 2, at 982 (finding that certain traits of judges and methods of their selection influence the way they decide cases).

238. Even if such data existed, they would inevitably include significant measurement error to the extent that they relied on individuals to report discharges separately from voluntary quits or layoffs.

239. The model used is

Because the employment-at-will rule is simply a default con-

$$B_{LP} = \left[1 + \left(\frac{1-P}{P} \right) e^{-B_L} \right]^{-1} - P$$

where P_{it} is the probability of employee i 's job ending at time t , X_{it} is a vector of characteristics of employee i and his current job (such as marital status, industry, and occupation), Z_{it} is a vector of dummy variables which are 1 if the state has adopted a particular exception to the at-will rule and 0 otherwise, and u_{it} is a random error term. P_{it} is the sum of the probabilities of a job ending from different causes: (i) discharge for cause; (ii) discharge not for cause; (iii) quits; and (iv) layoffs. Because I am concerned only with the effect of legal changes on (ii), there is the potential for bias if the legal changes are correlated with (i), (iii), or (iv). If the changes in the law are uncorrelated with changes in these other reasons for termination, the only effect will be the additional noise.

In the absence of uncertainty, legal rules prohibiting discharges for "bad reason" should have no impact on (i). In the presence of uncertainty concerning the courts' application of the rules, however, employers would be less likely to fire those employees who deserve it, and so one might expect the inclusion of (i) in P_{it} to bias the results in favor of finding an effect.

There is no theoretical reason to believe (iii) will be affected by changes in the employment-at-will rule, and hence no reason to suspect a systematic biasing of the results. Legal rule changes allowing wrongful discharge suits may increase (iv), since firms will have an incentive to cloak discharges that are prohibited under the rule as layoffs to escape liability. The courts which have directly considered whether "for cause" contracts restrict the employer's ability to discharge employees for economic reasons have all recognized economic necessity as a valid defense. See *Gesina v. General Elec. Co.*, 780 P.2d 1376, 1378 (Ariz. Ct. App. 1989) ("A bona fide decision based on sound economic reasons can constitute cause for discharge. . . . [I]n the case of a reduction in force due to economic reasons, as between two persons of equal ability, the one who has a lifetime contract is to be preferred for retention" (citations omitted)); *Crawford v. David Shapiro & Co.*, 490 So. 2d 993, 995 n.1 (Fla. Dist. Ct. App. 1986) (noting that a recession can be "just cause" for termination); *Telesphere Int'l, Inc. v. Scollin*, 489 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1986) (allowing company to terminate employee after project in which employee was engaged was abandoned); *Wilde v. Houlton Regional Hosp.*, 537 A.2d 1137, 1138 (Me. 1988) (permitting layoffs in light of financial difficulties); *Heltborg v. Modern Mach.*, 795 P.2d 954, 961 (Mont. 1990) (reducing staff for economic reasons is not subject to a negligence analysis); *Coombs v. Gamer Shoe Co.*, 778 P.2d 885, 887 (Mont. 1989) (emphasizing the importance of business viability); *Velantzas v. Colgate-Palmolive Co.*, 536 A.2d 237, 239 n.2 (N.J. 1988) (discharge justified if needed to achieve a reduction in the work force); *Linn v. Beneficial Commercial Corp.*, 543 A.2d 954, 957 (N.J. Super. Ct. App. Div. 1988) (allowing employee removal to achieve a legitimate business objective); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 486 (Utah 1989) (finding an exception to a "for cause" agreement in an employee manual to allow for a reduction in force under the "involuntary terminations" clause); see also *Tripp v. Hall*, 395 So. 2d 33, 34 (Ala. 1981) (the lack of funds for a position was held to be a sufficient defense); *Webster v. Schauble*, 400 P.2d 292, 293 (Wash. 1965) (closing office sufficient defense); *Rompf v. John Q. Hammons Hotels, Inc.*, 685 P.2d 25, 28-29 (Wyo. 1984) (stating that a manual does not act as a defense to employment-at-will in the face of economic adversity). Since such terminations are merely a relabeling of (ii) as (iv), they should be included to measure the extent of a real effect. Thus, although potentially noisy, the data should be adequate for this purpose.

tract rule, two groups are generally excluded from the rule: government employees²⁴⁰ and employees covered by collective bargaining agreements.²⁴¹ These groups must be excluded from the sample because they are unlikely to be affected in the same way, if at all, by the changes in the common law.²⁴² Union workers provide a convenient control group that should be unaffected by the changes in the common law.²⁴³

An empirical examination of the effects of these changes re-

240. Civil service laws and rules protect the former from arbitrary discharge, and constitutional guarantees of due process also limit government employers' ability to discharge employees. *See, e.g.,* Mowery v. Adams, 641 N.E.2d 1186, 1188-89 (Ohio Ct. App. 1994). Whether indefinite contracts are contracts at-will affects the level of process which is due, of course, but most government employees have some degree of protection from arbitrary dismissal under civil service provisions. Courts have applied employee handbooks, for example, to provide additional protection to public employees through a due process analysis. *See, e.g.,* Brandy v. City of Cedar Hill, 884 S.W.2d 913, 914-15 (Tx. Ct. App. - Texarkana 1994). Public employee law is sufficiently different from that governing private employees to warrant the exclusion of government workers from the sample. The changes in public employee law prevent their use as a reference group, however.

241. Union contracts almost always require cause for dismissal, and typically provide an arbitration mechanism as a method of review of employer decisions. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 6 (4th ed. 1985).

242. In addition to the substantial common law erosion of the rule, there has been a parallel erosion through federal, state, and local statutes, regulations, and ordinances. Many states, for example, prohibit by statute discharges of certain whistleblowers. *See, e.g.,* ILL. ANN. STAT. ch. 5, para. 395/1(2) (Smith-Hurd 1993) (Illinois whistleblower statute protecting some state employees who disclose information which the employee reasonably believes shows mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety and employees who file worker's compensation claims). Federal statutes bar discharges in retaliation for filing health and safety complaints, or asserting rights under the Fair Labor Standards Act or many other statutes. *See, e.g.,* 42 U.S.C.A. § 623(d) (West 1985) (stating that it is unlawful for an employer to discriminate against any of his employees because such employees opposed a discriminatory practice or filed a charge alleging discriminatory practice). As these laws apply generally, however, it is not possible to exclude the populations affected by them.

243. Employees covered by collective bargaining agreements generally have been unable to make common law wrongful discharge claims because their contracts provide for mandatory arbitration. *See* David L. Durkin, Comment, *Employment At-Will in the Unionized Setting*, 34 CATH. U. L. REV. 979, 1004 (1985) (noting that a union member wishing to sue for breach of a collective bargaining agreement must exhaust that procedure, and then judges will defer to the arbitrator, such that absent an exception the suit will not be allowed to proceed). There have been exceptions, however. *See, e.g.,* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir.) (finding that a remedy in tort superseding the contractual arbitration remedy does not pose a threat to collective bargaining), *cert. denied* 471 U.S. 1099 (1984); *see also* Durkin, *supra*, at 1014-18 (discussing scenarios in which unionized workers can bring state tort claims). In the landmark New Hampshire Supreme Court decision in *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 553 (N.H. 1974), the plaintiff was a union member who ignored an established grievance procedure. The *Monge* court majority did not address this issue.

quires a theory about how legal changes affect people who are outside the legal events which produce the change. I assume that the most important effect is the creation of legal uncertainty over the outcome of a wrongful discharge claim. Prior to the development of the modern exceptions, an employer could be confident that a white male employee under forty would be unable to file a claim in almost all cases of discharge. After a court decision which suggested that such claims were possible in the employer's state, however, the employer could no longer be as confident and would be forced to prepare for a potential claim.²⁴⁴ These preparations would be the mechanism by which discharges for "bad reasons" would be avoided.

Before their behavior changes, employers must learn of the change in legal rules. There are a large number of channels through which news of an opinion might reach employers. The popular press may publicize a decision, which becomes more likely as the amount of money involved increases, the rank of the deciding court rises, and the facts become more interesting.²⁴⁵ Specialized employment law services²⁴⁶ publicize decisions to both employment lawyers and personnel departments. Lawyers often provide clients with notice of important decisions which might affect them through newsletters, phone calls, or meetings. Continuing legal education seminars disseminate news of changes in the

244. The authority to discharge might be taken from line managers and given to the personnel department, for example, or the amount of documentation of bad or unproductive conduct required for a discharge might be raised.

245. In *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025 (Ariz. 1985), for example, an employee alleged she was fired after she refused to participate in a parody of the song "Moon River" staged by other employees which involved "moonning" the audience. *Id.* at 1029. She claimed this discharge violated the Arizona public policy against indecent exposure. *Id.* at 1035. The Arizona Supreme Court determined that it was unnecessary to decide whether moonning was an actual violation of the indecent exposure statute but that since it might involve conduct prohibited by that statute, a public policy claim was stated. *Id.* The spread of news of the *Wagenseller* decisions was enhanced by the subject matter. See, e.g., *Nurse Gets OK to Pursue Suit in 'Moon' Case*, ARIZ. REPUBLIC, June 22, 1984, at B1, B2 (reporting Court of Appeals opinion; story also listed in *News Summary*, at A2, as the lead item in local news); *Bum Rap? Nurse Fired after Refusal to Bare Bottom Can Sue*, ARIZ. REPUBLIC, June 18, 1985, at 12B1, B3 (reporting Supreme Court opinion).

246. The Bureau of National Affairs, for example, has published a looseleaf service on Individual Employment Rights since 1986. See 9 INDIVIDUAL EMPLOYMENT RIGHTS (BNA) (looseleaf compilation of applicable cases) and 9A INDIVIDUAL EMPLOYMENT RIGHTS (BNA) (looseleaf manual). Before that, all at-will cases were published in a cumulative index. See generally LABOR REL. CUMULATIVE DIGEST & INDEX WITH TABLE OF CASES, (BNA). Both of these publications are continuously updated.

law,²⁴⁷ as do management seminars. Computerized legal databases boast of instant retrieval of new opinions. Local services exist which disseminate opinions of courts almost immediately.²⁴⁸ I assume therefore that news of opinions adopting exceptions to employment-at-will is disseminated to employers rapidly and that most employers quickly become aware that a new remedy has been created.²⁴⁹

1. Case Selection

Based on this model of the way in which legal decisions affect employer behavior, I examined the case law in each of the fifty common law jurisdictions.²⁵⁰ In general, I used the date of the earliest court opinion which met my other criteria. I included courts other than the court of last resort in a state, including some state trial and intermediate appellate courts and federal district and circuit courts interpreting state law,²⁵¹ because the issuance of an

247. Two of the major continuing legal education providers regularly survey the law in this area. See Frederick Brown, *Wrongful Termination and Emerging Fads* in PRACTICING LAW INSTITUTE, 20TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 1991, at 703 (PLI Litig. & Admin. Practice Course Handbook Series No. 416, 1991) (discussing the direction of the law in this field); David A. Cathcart & Pamela J. Thomason, *State-by-State Survey of Wrongful Termination Case Law* in LABOR AND EMPLOYMENT LAW 553 (Peter M. Panken ed.) (6th ed. 1992) (giving a state-by-state summary of the case law).

248. See *supra* part II.B.4 (describing the way in which even unpublished opinions have helped construct the common law via ad hoc distribution methods).

249. This is not the same as assuming that employers are aware of the precise legal contours of the new cause of action. The courts themselves take years to determine those. Both the New Hampshire experience with *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 553 (N.H. 1974), and the California experience with *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980), demonstrate how long this process may take (six and eight years respectively). See *supra* notes 6 and 234. (discussing *Monge's* and *Cleary's* history, respectively). Similarly, litigation in New Hampshire over the extent of the effect of the reinterpretation of *Monge* continued for several years. See *supra* note 6 (discussing *Monge's* history). All that matters for this paper is that the issuance of an opinion produces a rapid rise in employers' uncertainty concerning their potential liability for discharging an employee.

250. The District of Columbia and all states but Louisiana.

251. Federal courts often find themselves presented with wrongful discharge claims that have not yet been recognized by the courts of the state whose law governs. In Pennsylvania, for example, there was an extensive period during which federal court opinions were the primary source of law on employment-at-will. From 1959 to the early 1980s, the Pennsylvania Supreme Court addressed the issue of at-will employment only once, in *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). Since *Geary*, federal courts in Pennsylvania have addressed the issue 37 times. See *Kramer, supra* note 132, at 253; see also *Odeh v. Humble Oil & Refining Co.*, 201 F.2d 123, 128 (10th Cir.) (the first case to apply the at-will rule in New Mexico and cited as the source of the rule by the New Mexico courts), *cert. denied*, 345 U.S. 941 (1953); *Laws v. Aetna Fin. Co.*, 667 F.

opinion by any of them would create a significant amount of uncertainty concerning the applicability of the at-will rule in that state. Further, lower courts are rarely far in front of supreme courts when modifying a longstanding rule like the employment-at-will rule, and are likely to defer to the supreme court on such a major change.²⁵² When lower courts do adopt a change, therefore, it is a good indicator that the law has in fact changed. Even if the lower court were later reversed, during the period between its opinion and the reversal, employers in that state would have good reason to behave as if the legal rule had changed. Since my specification allows for the law to change back,²⁵³ I can capture such an intermediate period.

When the first opinion to adopt an exception in a state is from a federal court which has unambiguously predicted the state courts' acceptance of a common law exception,²⁵⁴ I have used the date of that opinion for the exception.²⁵⁵ When the federal court opin-

Supp. 342, 348 (N.D. Miss. 1987) (adopting public policy exception in advance of the Mississippi state courts); Morriss, *Exploding Myths*, *supra* note 132, at app. A (illustrating sources used by courts in formulating the at-will rule).

252. See, e.g., *Maus v. National Living Ctrs., Inc.*, 633 S.W.2d 674 (Tex. Ct. App.—Austin 1982) (writ ref'd n.r.e.):

Thus we stand at the crossroads of two important public policies As neither the Texas Legislature nor the Texas Supreme Court has established the State's position in this sensitive area, this Court must exercise judicial restraint and refrain from creating this new right of recovery. To do otherwise would be to exceed our proper authority within the legal framework.

Id. at 676. *Maus* discusses the resolution of a similar question, whether to extend strict liability beyond the only area expressly approved at the time by the Texas Supreme Court, "food for human consumption." The Amarillo intermediate appellate court refrained from doing so, and when the Texas Supreme Court ultimately did extend the doctrine, it "commended the Amarillo Court's restraint." *Id.* (citing *Sales Associates, Inc. v. McKisson*, 408 S.W.2d 124 (Tex. Civ. App.—Amarillo 1966), *rev'd* 416 S.W.2d 787, 791 (Tex. 1967). See also *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex. Ct. App.—Dallas 1979) ("If the case were one of first impression, we would have the responsibility as well as the opportunity to consider the social implications of our decision. . . . When the law is admittedly settled, however, the obligatory course for an intermediate court is judicial self-restraint.") (writ ref'd n.r.e.).

253. In the case of New Hampshire, for example, I consider the implied covenant exception to have been in effect between February 28, 1974, the date of *Monge*, and May 5, 1980, the date of *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980). See *supra* note 6.

254. Increasingly, states are adopting provisions which allow federal courts to certify questions of state law to the state supreme court for decision. See, e.g., MASS. SUP. JUD. CT. R. 3:21, 359 Mass. 787, 790-92 (1971), *amended* 366 Mass. 853, 871 (1974). This solves the problem in most cases, although the state court is free to decline to answer the question. See *supra* note 111 (describing limitations on a state court's ability to certify a federal court's question).

255. See, e.g., *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 348-49 (N.D. Miss. 1987)

ion simply refused to dismiss a case for failure to state a claim,²⁵⁶ I have not used it. I also excluded opinions from federal district courts located in states other than the one whose law is being interpreted,²⁵⁷ as the presumptive expertise in local law would not exist.²⁵⁸ Many court decisions are unpublished. Although in all cases I relied on published opinions, I did not use a blanket presumption against unpublished opinions but examined each case I identified individually.²⁵⁹

Some retaliatory discharge cases in which employers invoke the at-will rule are based on interpretation of statutes, particularly workers' compensation statutes.²⁶⁰ When the opinion simply interpreted relatively clear language to provide a remedy, I did not consider that such an opinion created a new common law exception. When the opinion indicated it was creating a common law cause of action to prevent subversion of the statutory scheme or when the language interpreted would appear to a reader armed with common sense to create such a cause of action, I considered the case to have created a public policy exception.²⁶¹

2. Case Categorization

Although there are three generally recognized categories of common law exceptions,²⁶² these categories are not the only way to subdivide the cases. One could consider, as Dertouzos and

(explicitly guessing that Mississippi would recognize a public policy exception).

256. See, e.g., *High v. Sperry*, 581 F. Supp. 1246, 1248 (S.D. Iowa 1984).

257. See, e.g., *Whitehead v. Telesphere Int'l, Inc.*, 611 F. Supp. 961 (N.D. Ill. 1985) (applying Texas law).

258. Such cases are also not necessarily available to lawyers in the home jurisdiction. *Whitehead*, for example, is digested in the Illinois digest and not the Texas digest, and was not available in the Texas library in LEXIS when I researched these cases..

259. An example of a close case was the Ohio public policy exception. The Sixth Circuit opinion in *Merkel v. Scovill, Inc.*, 787 F.2d 174 (6th Cir.) *cert. denied*, 479 U.S. 990 (1986) notes that the district court in that case had made an *Erie* guess that Ohio would recognize a public policy exception. *Id.* at 180. Since *Merkel* was argued at the circuit on December 6, 1985, and since the district court's ruling is identified as having been made prior to the post-trial motion stage, it is possible that the federal district court ruling precedes the opinion in *Goodspeed v. Airborne Express, Inc.*, 121 L.R.R.M. (BNA) 3216 (Ohio Ct. App. 1985), issued February 12, 1985. I did not count the district court opinion in *Merkel* since it was unpublished, a federal court opinion, and a trial court opinion which was known to be on appeal. (Even if this choice was incorrect, the closeness in time of *Goodspeed* means the difference is unlikely to be significant).

260. See *supra* notes 179-81 and accompanying text.

261. This problem arose most frequently in connection with workers' compensation statutes. See *supra* notes 179-83 and accompanying text.

262. See *supra* notes 226-34 and accompanying text.

Karoly did, the significant division to be whether tort or contract damages are available.²⁶³ Alternatively, one could subdivide the exceptions into smaller categories, such as broad or narrow public policy exceptions. I adopted the conventional legal view and separated the cases into the three doctrinal categories for several reasons. First, this division corresponds to a number of important legal distinctions. The public policy claims, even at their broadest, are relatively narrow, since to be liable, the employer must fire an employee for a reason contrary to some *public* policy, not simply because the employer dislikes the employee. This limits the types of behavior against which the employer must guard.²⁶⁴ Any discharge, by contrast, is a potential source of implied contract claims. These cannot be prevented simply by reviewing discharges at the time of discharge, as the claim rests on conduct occurring prior to discharge.²⁶⁵ Finally, the implied covenant claims are extremely broad, since they require the employer to engage in good faith behavior measured by an uncertain standard and are implied by law into all contracts.

3. Alternative Datings

To further guard against errors in dating, I also used the alternative dates developed independently by Dertouzos and Karoly and by Krueger for their analyses. They made different choices in some instances, providing a valuable check on the robustness of my results. To test whether the conclusions are sensitive to the dating methodology, I used all three sets of dates. In addition to these dating methods, I constructed two additional sets of dates. In the "narrow" method, I date an exception only when all three primary

263. DERTOUZOS AND KAROLY, *supra* note 2, at 8-9.

264. See, e.g., *Percival v. General Motors Corp.*, 400 F. Supp. 1322, 1324 (correcting misinformation given to general public not sufficient), *aff'd*, 539 F.2d 1126 (6th Cir. 1976); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980) (right to work law not sufficient basis); *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54, 56-58 (Idaho 1977) (participation in unauthorized Christmas party fund does not implicate public policy); *Keneally v. Orgain*, 606 P.2d 127, 129-30 (Mont. 1980) (no public policy to prevent firing for complaining that employer did not adequately service product or pay bonuses); *Marsh v. Boyle*, 530 A.2d 491, 495 (Pa. Super. Ct. 1987) (no public policy exists "protecting against termination of employees who have performed their duties properly"); *Cisco v. United Parcel Service, Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984) (public policy of presumption of innocence insufficient); *Jones v. Keogh*, 409 A.2d 581, 582 (Vt. 1979) (full employment and employee-employer harmony insufficient).

265. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983) (recognizing public policy exceptions are based on type of activity prior to discharge).

methods have listed it as adopted. In the "broad" method, I use the earliest date of the three. Thus the implied contract date for Arkansas, for example, would be November 22, 1982 under the broad method and April 1, 1985 under the narrow method.²⁶⁶ Although there is no substantive content to the constructed categories, they will be useful to examine whether the "correct" dating method's results are bracketed by "narrow" and "broad" methods.

Table 10 shows the correlation for each type of exception across the primary dating methodologies for the union and non-union samples. The implied covenant exception is the most highly correlated, which is to be expected as the fewest states have adopted it. Krueger's and Dertouzos and Karoly's methods yield more highly correlated assignments for the implied contract exception than do my method and either of the others, but are less highly correlated for the public policy exception than my method is with either.

The exceptions themselves are highly correlated, and Table 11 presents correlations within methods and between methods for each of the three types. Dertouzos and Karoly's method and my method produce assignments significantly more highly correlated between the public policy and implied contract exceptions, while the Krueger dating results in a slightly higher degree of correlation between the public policy and implied covenant exceptions. All three methods find a much higher degree of correlation between the implied covenant and implied contract exceptions than either of the other two pairings, which is to be expected since both are based on contract theories.

266. See *infra* notes 339-49 and accompanying text (discussing Arkansas' implied contract cases).

Table 10 Sample Correlations Between Methods and Within Exceptions

Exception / Study		Union Observations		Nonunion Observations		All Observations	
		Krueger	RAND	Krueger	RAND	Krueger	RAND
Public Policy	Morriss	88.49	87.91	90.34	90.75	89.85	90.00
	Krueger	--	85.49	--	87.94	--	87.29
Implied Contract	Morriss	87.12	88.31	85.07	85.62	85.61	86.32
	Krueger	--	95.02	--	93.65	--	94.01
Implied Covenant	Morriss	98.82	99.67	98.12	99.01	98.30	99.18
	Krueger	--	99.05	--	98.73	--	98.81

Source: calculated from the sample and case assignments in Appendix B.

4. Results

If the critics of the at-will rule are correct, (i) there are significant numbers of discharges for reasons unconnected with productivity and which are not justified by employers' business needs *and* (ii) modification of the at-will rule will halt many, if not all, of these discharges.²⁶⁷ If both (i) and (ii) are true, then the adoption of exceptions to the at-will rule should reduce the probability of discharge. If either is false, then the effect of the common law changes will be indeterminate. For all three exceptions the results should be indeterminate for union sector data, since none of the exceptions is generally applicable,²⁶⁸ and stronger for white men under forty, who are unprotected by the Age Discrimination in Employment Act²⁶⁹ and have historically not brought numerous Title VII suits over individual discharges.

A statistically significant negative probability coefficient for an

267. It may be that fired employees are reluctant to take advantage of the remedies available to them for reasons unconnected to their claims. Kristin Bumiller makes such an argument with respect to Title VII claims, contending that the employees are reluctant to see themselves as victims. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 99-103 (1991). I am unaware of any similar claim with respect to nondiscriminatory arbitrary discharges.

268. Occasionally an employee covered by a collective bargaining agreement is able to make a claim. *See, e.g., Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1984); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974); Durkin, *supra* note 245, at 1006 (discussing *Garibaldi*).

269. *See* 29 U.S.C.A. § 631(a) (West 1994 Supp.) (stating that "[t]he prohibitions [against age discrimination] shall be limited to individuals who are at least 40 years of age.").

exception indicates that recognition of that exception decreases the probability that an employee's job will end in any given month. As can be seen from the probability coefficient²⁷⁰ results in Table 12, a significant negative effect on the probability of discharge under my dating method for all white men resulted only from the public policy exception.²⁷¹ The implied covenant coefficient was generally negative although insignificant. Although generally insignificant, the sign of the implied contract exception coefficient depended on the specification. With differences in the magnitude of coefficients and the significance levels, this result was generally true for the Dertouzos and Karoly, Krueger, and narrow dating methods as well. Interestingly, the broad method resulted in different coefficients' attaining significance. Table 14 gives the results for the sample of nonunion white men under forty. The signs, magnitude, and significance are generally similar to the results for all nonunion white men.

270. With dichotomous independent variables the appropriate formula is:

$$B_{LP} = \left[1 + \left(\frac{(1 - P)}{P} \right) e^{(-B_L)} \right]^{-1} - P$$

Morley Gunderson et al., *Logit Estimates of Strike Incidence from Canadian Contract Data*, 4 J. LAB. ECON. 257, 267 (1986).

271. The details of the various specifications are discussed in Appendix C. The specifications used included both methods of identifying job changes described above, various variables describing personal characteristics of employees, and in some cases, variables for occupation and profession. See *infra* Appendix C.

Table 11 Sample Correlations Within Methods and Between Exceptions

Exceptions	Study	Exceptions					
		Public Policy			Implied Contract		
		Union	Nonunion	All	Union	Nonunion	All
Implied Contract	M	64.08	70.01	68.45	--	--	--
	K	64.18	65.22	64.95	--	--	--
	R	66.36	68.94	68.26	--	--	--
Implied Covenant	M	56.43	62.56	60.95	69.39	69.17	69.23
	K	63.05	67.70	66.48	77.03	78.28	77.96
	R	54.29	60.06	58.95	75.07	76.04	75.78

Source: calculated from the sample and case assignments in Appendix B.

Table 12 White men, nonunion members

Specification		Morriss	Krueger	RAND	Narrow	Broad
Public Policy	(1)	-0.00215	-0.00107	-0.00037	-0.00121	-0.00123
	(2)	-0.00412	-0.00436	-0.00336	-0.00526	-0.0000295
	(3)	-0.00202	-0.00009	-0.00031	-0.00104	-0.00122
	(4)	-0.00411	-0.00417	-0.00329	-0.00515	-0.000263
Implied Contract	(1)	0.003477	0.002777	0.001124	0.001742	0.001936
	(2)	-0.00105	0.001019	0.000255	0.000519	-0.00378
	(3)	0.0023345	0.002722	0.000967	0.001592	0.002014
	(4)	-0.00103	0.000966	0.000272	0.00468	-0.00369
Implied Covenant	(1)	-0.00293	-0.00455	-0.0021	-0.00226	-0.00511
	(2)	-0.00299	-0.00278	-0.00169	-0.0004	-0.00971
	(3)	-0.00305	-0.00372	-0.00212	-0.00225	-0.00971
	(4)	-0.00296	-0.00297	-0.00172	-0.00041	-0.01006

Note: **Bold** indicates underlying logit coefficient significant at 5% level.

Table 13 White men, union members

Specification		Morriss	Krueger	RAND	Narrow	Broad
Public Policy	(1)	0.000572	-0.00135	0.001396	0.000113	-0.0005
	(2)	-0.00275	-0.0037	-0.0016	-0.00409	-0.003436
	(3)	-0.00039	-0.00183	-0.00071	-0.00049	0.0000805
	(4)	-0.00287	-0.00358	-0.00191	-0.00419	0.000282
Implied Contract	(1)	-0.00196	0.004895	0.002616	0.001869	-0.00494
	(2)	-0.00173	0.000568	-0.00072	0.000382	-0.00121
	(3)	-0.00101	0.005661	0.004038	0.001998	-0.0047
	(4)	-0.00195	0.000262	-0.00084	0.000193	0.001077
Implied Covenant	(1)	-0.00335	-0.00364	-0.00591	-0.003	0.003235
	(2)	-0.00269	-0.0027	-0.00317	-0.00202	-0.00218
	(3)	-0.00225	-0.00289	-0.0051	-0.00253	0.003558
	(4)	-0.00195	-0.00239	-0.00291	-0.00161	-0.00218

Note: **Bold** indicates underlying logit coefficient significant at 5% level.

Table 14 White men under 40, nonunion members

Specification		Morriss	Krueger	RAND	Narrow	Broad
Public Policy	(1)	-0.00291	-0.0013	-0.00088	-0.002	-0.0007
	(2)	-0.00288	-0.00417	-0.00298	-0.0051	-0.00107
	(3)	-0.0027	-0.00184	-0.00253	-0.00175	-0.00071
	(4)	-0.003	-0.00405	-0.003	-0.00507	-0.0008
Implied Contract	(1)	0.002073	0.00296	0.000162	0.000764	0.002679
	(2)	-0.00209	0.001778	0.000162	0.001038	-0.004990
	(3)	0.001923	0.001224	-0.000003	0.00061	0.002815
	(4)	-0.00195	0.001542	0.000268	0.000816	-0.005120
Implied Covenant	(1)	-0.00293	-0.00386	-0.00193	-0.00229	0.00705
	(2)	-0.00297	-0.00215	-0.00126	0.0000763	-0.00920
	(3)	-0.00288	-0.00368	-0.00126	-0.00201	-0.00732
	(4)	-0.00281	-0.00226	-0.00127	-0.000185	-0.00948

Note: **Bold** indicates underlying logit coefficient significant at 5% level.

Table 13 shows that the results for the union sample were generally insignificant. This is consistent with the hypothesis that changes in the common law of wrongful discharge would not affect those working under collective bargaining agreements and so

would not change the probability of a job's ending. Table 15 shows the results for union employees under forty, which are resolutely and gratifyingly insignificant.

There is fairly strong evidence of a small negative effect²⁷² on the probability of a nonunion job's ending from the appearance of a public policy exception. This may be because employers react more to those decisions than to the other types or because employers are likely to learn quickly about public policy exceptions. The facts of public policy cases generally make good press—employees who win decisions in cases in which they accuse their employer of violating public policy are likely to get wider coverage than are claims about contract violations. Public policy claims are also more likely to generate large awards since they generally sound in tort. Clearly this is a subject for further investigation.

The more interesting conclusion is the sensitivity of the results to the method of dating. The public policy coefficient, for example, varies between -0.00037 and -0.00215 for specification (1), an almost six-fold difference, depending on which method of dating was used. In some cases, there were changes in the sign of the coefficient.²⁷³ In addition, the broad method of dating produced results with quite different levels of significance from the other methods. This highlights the need for both legal accuracy in identifying changes in the common law and explicit discussion of the method used in empirical work. Perhaps most interestingly, the differences in the results are not bounded by the constructed methods of dating.²⁷⁴ Dating changes in the law is thus not something one can address simply by making "narrow" or "broad" assumptions.

272. Even where significant, however, the effects are very small. Part of the explanation is the time scale of the data. It would be surprising indeed if a change in wrongful discharge law had a large impact on the probability of discharge during a given month. There is also a potential bias because of the lack of available data on state level economic conditions.

273. Several of the implied contract specifications had this characteristic. See *infra* tbls. 12 & 14.

274. In other words, neither the broad nor the narrow method produces consistently high or low estimates compared to the others. *Id.*

B. *Changes in the Law*

Alan Krueger examined the impact of changes in the common law on state legislatures' consideration of statutory remedies for wrongful discharge.²⁷⁵ He used data on the introduction of just-cause dismissal laws in state legislatures between 1981 and 1988.²⁷⁶ Because both employer and employee groups sometimes jointly support statutes which create a cause of action for wrongful discharge, he argued that a general explanation of just-cause dismissal laws as employee-initiated reform of employment-at-will is inadequate.²⁷⁷ Instead, Krueger suggested a tradeoff by employers similar to the compromise which produced workers' compensation laws in the early twentieth century, noting that "many employers are willing to support unjust-dismissal legislation and accept a 'just cause' firing requirement in exchange for the implementation of a strict standard for employees to recover punitive damages and a consistent, well-defined legal definition of unjust dismissals."²⁷⁸ He then concluded that the testable implication²⁷⁹ of the theory is "that unjust-dismissal legislation is more likely to be proposed and ultimately enacted into law in states where the courts have recognized exceptions to the traditional employment-at-will doctrine than

275. See Krueger, *supra* note 8, at 648-50.

276. *Id.* at 655.

277. *Id.* at 653.

278. *Id.* at 653.

279. The statistical framework used is straightforward: employer resistance to legislation is determined by a latent variable, y^* , which depends on the costs of claims under legislation, the cost in the absence of legislation, and a random disturbance. *Id.* at 654. The hypothesis is that a proposed statute will receive employer support if the difference between the costs under legislation and the costs in the absence of legislation is greater than the disturbance term. *Id.* Krueger assumes, correctly I believe, that employee groups always support such legislation. *Id.* at n.18; see also Jack Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 562 (1985) (citing union support for proposals in Connecticut, California, and Michigan). The proposal of a bill, y_t , is an indicator of y^* , and is 1 if a bill is introduced and 0 if no bill is introduced. Dummy variables are used to control for the common law exceptions' existence, represented by E_{it} for exception i in year t . The basic equation estimated is then:

$$y_t = F(E_{1,t-1}, E_{2,t-1}, E_{3,t-3}, X_t)$$

where X_t is a vector of state-level explanatory variables and F is the logistic cumulative distribution function. Krueger, *supra* note 8, at 654. Covariates included union membership, proportion of Democratic members of legislature, unemployment rate, and proportion of employment in manufacturing. *Id.* at 655-56. Krueger uses the same doctrinal division as my analysis: (i) public policy, (ii) implied contract, and (iii) implied covenant of good faith and fair dealing. *Id.* at 655.

in states where they have not."²⁸⁰ Krueger found that the existence of the good faith and public policy exceptions had a positive and significant effect on the likelihood of legislation being enacted, while the existence of the implied contract exception had a positive, but not significant, effect.²⁸¹

Jack Stieber and Richard Block criticized Krueger's analysis.²⁸² Their primary criticism²⁸³ was that employers generally oppose just-cause legislation.²⁸⁴ Most interesting for the purposes of this paper is what Stieber and Block do *not* criticize. They do not quarrel with Krueger's analysis of the common law, with his tripartite division of exceptions, or with his model of how court decisions influence legislative action. In all of these areas it is at least possible to differ with Krueger's model; given Stieber's position as a leading critic of the at-will rule, it is at least surprising that a generally hostile piece would fail to mention any of these areas. Perhaps this is due to the lack of any foundation principles on which to base such criticism and the lack of information in empirical articles which makes discovering problem areas without extensive research possible.²⁸⁵

To test the sensitivity of Krueger's results, I reestimated Krueger's equations using the alternative methods of dating described in detail above.²⁸⁶ As Table 16, Table 17, and Table 18

280. *Id.* at 653.

281. *Id.* tbl. 4, at 655.

282. Jack Stieber & Richard N. Block, *Comment on Alan B. Krueger, "The Evolution of Unjust-Dismissal Legislation in the United States,"* 45 INDUS. & LAB. REL. REV. 792 (1992). Stieber is one of the main academic critics of employment-at-will. *See generally*, e.g., Jack Stieber, *The Case for Protection of Unorganized Employees Against Unjust Dismissal*, 32 IRRA ANN. PROC. 155 (1974); Stieber & Murray, *supra* note 220; Stieber, *supra* note 279.

283. Stieber and Block also question whether Krueger accurately determined which states introduced bills and criticize the interpretation of the econometric results. These criticisms are generally inaccurate or incorrect. *See* Alan B. Krueger, *Reply*, 45 INDUS. & LAB. REL. REV. 796, 797-99 (1992) (refuting the criticisms of Stieber and Block). However, there are a number of other problems with Krueger's analysis. *See infra* note 285 and accompanying text.

284. Stieber & Block, *supra* note 282, at 794-95.

285. Krueger's case citations are available, for example, only as an unpublished appendix which includes case names but not citations. *See* Krueger, *supra* note 8, unpublished app. (on file with author).

286. These were: (i) my own dating, *see supra* part III.A.; (ii) the tripartite dating used by Dertouzos & Karoly, *see* DERTOUZOS & KAROLY, *supra* note 2, at 21; (iii) the "narrow" definition of changes in the law, which recorded a change only when all studies' dating concurred; and (iv) the "broad" definition which recorded a change as occurring on the earliest date listed by any of the three methods. Krueger graciously provided

demonstrate, Krueger's data and results²⁸⁷ are sensitive to the method of dating.²⁸⁸

Table 15 White men under 40, union members

Specification		Morriss	Krueger	RAND
Public Policy	(1)	0.000612	-0.00178	-0.00053
	(2)	-0.00148	-0.0024	-0.00031
	(3)	-0.00187	-0.00286	0.000438
	(4)	-0.00192	-0.00269	-0.00079
Implied Contract	(1)	-0.00144	0.005241	0.00057
	(2)	-0.00127	-0.0024	-0.00043
	(3)	-0.00059	0.004164	0.002627
	(4)	-0.00118	-0.00269	-0.00017
Implied Covenant	(1)	-0.0015	-0.0039	-0.00632
	(2)	-0.0012	-0.00153	-0.00248
	(3)	-0.00094	-0.00333	-0.00619
	(4)	-0.00092	-0.00132	-0.0021

Specification		Narrow	Broad
Public Policy	(1)	0.000606	-0.00338
	(2)	-0.00229	0.002886
	(3)	-0.00111	-0.00206
	(4)	-0.00257	0.003004
Implied Contract	(1)	0.000318	-0.00537
	(2)	0.00031	-0.00169
	(3)	0.001003	-0.00506
	(4)	0.000246	-0.00164
Implied Covenant	(1)	-0.00593	0.011738
	(2)	-0.00097	-0.00142
	(3)	-0.00568	0.010144
	(4)	-0.00063	0.000938

Note: **Bold** indicates underlying logit coefficient significant at 5% level.

me with his data set, enabling these comparisons.

287. The issue in this Article is the sensitivity of results to the dating method. To compare results, therefore, I simply reestimated Krueger's results with the different dates produced by each dating method.

288. See *infra* notes 289-91 and accompanying text.

Table 16 Means and Standard Deviations of Selected Variables

Variables		States With Laws Proposed	States Without Laws Proposed	All States
Morriss	Public Policy	0.929 (0.267)	0.482 (0.500)	0.498 (0.501)
	Implied Contract	0.571 (0.514)	0.448 (0.498)	0.453 (0.498)
	Implied Covenant	0.429 (0.514)	0.083 (0.276)	0.095 (0.294)
Krueger	Public Policy	0.929 (0.267)	0.430 (0.496)	0.448 (0.498)
	Implied Contract	0.643 (0.497)	0.319 (0.467)	0.33 (0.471)
	Implied Covenant	0.429 (0.514)	0.080 (0.272)	0.925 (0.290)
Rand	Public Policy	0.857 (0.363)	0.526 (0.500)	0.538 (0.499)
	Implied Contract	0.571 (0.514)	0.347 (0.477)	0.355 (0.479)
	Implied Covenant	0.429 (0.514)	0.073 (0.260)	0.085 (0.279)

Table 17 Means and Standard Deviations for Constructed Dating Methods

Variables		States With Laws Proposed	States Without Laws Proposed	All States
Broad	Public Policy	0.560 (0.497)	0.929 (0.267)	0.573 (0.495)
	Implied Contract	0.477 (0.500)	0.643 (0.497)	0.483 (0.500)
	Implied Covenant	0.098 (0.298)	0.429 (0.514)	0.11 (0.313)
Narrow	Public Policy	0.412 (0.493)	0.857 (0.363)	0.428 (0.495)
	Implied Contract	0.262 (0.440)	0.571 (0.514)	0.273 (0.446)
	Implied Covenant	0.648 (0.246)	0.429 (0.514)	0.078 (0.268)

The results are sensitive in several ways. First, the assignments of states to the two categories of the dependent variable are different. Table 16 shows the assignments across the dating methods used by Krueger, Dertouzos and Karoly, and me. Table 17 shows the assignments across the methods constructed through combinations of those three (the "narrow" and the "broad" method). Second, the linear estimates of the probability of the enactment of the unjust discharge statutes differ significantly.²⁸⁹ The estimates vary,

289. Krueger calculated the linear probability estimates using the formula

$$B_{LP} = \frac{\partial P}{\partial X} = P(1 - P) B_L$$

See Krueger, *supra* note 8, at 656 n.21. This formula is valid only for marginal changes in independent variables and is therefore inappropriate for use with dummy variables such as the ones used to control for legal environment changes. With dichotomous independent variables the appropriate formula is the one given in note 239.

for example, from an increase of 7.6% under Dertouzos and Karoly's method,²⁹⁰ to an increase of 28.5% under Krueger's method.²⁹¹

Table 19 and Table 20 examine the correlations among the dating methods for the observations in Krueger's data set.²⁹² As expected, the correlations between methods are highest for the implied covenant exception, which has rarely been adopted, and for the public policy exception, where the differences are smaller. The implied contract exception, which is most affected by the different treatment of dicta and dismissed cases, has the lowest correlations across methodologies.

Table 18 Comparison of Linear Probability Coefficients

Specification		Krueger	Morriss	Rand	Broad	Narrow
Public Policy	(1)	0.285	0.232†	0.076†	0.190†	0.133†
	(2)	0.279	0.203†	0.058†	0.053	0.127
	(3)	0.273	0.190	0.050†	0.147	0.120†
Implied Contract	(1)	0.044	0.004†	0.010†	0.143†	0.042†
	(2)	0.030	-0.005†	0.017†	-0.001†	0.026*
	(3)	0.027	-0.001*	0.002†	0.006†	0.023†
Implied Covenant	(1)	0.199	0.124†	0.158†	0.124†	0.142†
	(2)	0.149	0.159†	0.197†	0.402†	0.169**
	(3)	0.175	0.180	0.242†	0.190†	0.200†
Total Exceptions	(4)	0.105	0.075†	0.063†	0.067†	0.065†
	(5)	0.102	0.073†	0.058†	0.065†	0.068†
	(6)	0.109	0.075†	0.061†	0.071†	0.076†

*Differs at 5% level from Krueger point estimate.

**Differs at 1% level from Krueger point estimate.

†Differs at ½% level from Krueger point estimate.

Note: **Bold** indicates underlying logit coefficient is significant at 5% level.

290. DERTOUZOS & KAROLY, *supra* note 2, at 32-33.

291. Krueger, *supra* note 8, at 655-56.

292. The correlations are generally smaller than in my data set, which is to be expected since Krueger's data set contains only one observation per state per year instead of an observation per individual per month.

Table 19 Correlations within Dating Materials

Variable	Study	Public Policy	Implied Contract
Public Policy	Morriss	--	0.22
	Krueger	--	0.11
	RAND	--	0.33
Implied Covenant	Morriss	0.21	0.12
	Krueger	0.13	0.16
	RAND	0.19	0.19

C. Aggregate Impacts

Dertouzos and Karoly examined the impact of changes in wrongful discharge law on state aggregate employment levels.²⁹³ The basic premise of the model²⁹⁴ is similar to the familiar economic analysis of laws which add to the cost of employing a worker, such as worker's compensation laws:²⁹⁵ employment levels will be reduced, perhaps after a period of adjustment, when states adopt a new exception to employment-at-will.²⁹⁶ Dertouzos and Karoly use three slightly different specifications of the legal environment:

293. DERTOUZOS & KAROLY, *supra* note 2, at 46. They also examined the effects on different industries and firm types and on the speed of employment adjustment. *Id.* at 53. In a different section they examined the development of exceptions to the at-will rule; no data was available to conduct a reevaluation with alternative dating. *Id.* at 5-7.

294. The model estimated is a straightforward test of this hypothesis:

$$\begin{aligned} \ln(E_{i,t}) = & B_0 + B_1 \ln(GSP_{i,t}) \\ & + B_2 [\ln(GSP_{i,t}) - \ln(GSP_{i,t-1})] \\ & + \sum_{k=2}^{50} \lambda_k S_{k,i} + \sum_{j=1}^6 \alpha_j Y_{j,t} + \delta X_{i,t} \\ & + \gamma W_{i,t} + \mu_{i,t} \end{aligned}$$

here GSP_{it} is the gross state product in constant dollars for state i in year t ; S_{it} is a set of state dummy variables; Y_{it} is a set of year dummy variables; X_{it} is a vector of other control variables; W_{it} is a set of variables indicating the presence of common law changes; and u_{it} is a random disturbance. *Id.* at 47.

295. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 235 (3d ed. 1986).

296. DERTOUZOS & KAROLY, *supra* note 2, at 44.

Model I: a tort/contract damages distinction, dividing exceptions into cases of whether a tort or contract remedy is allowed;

Model II: a tripartite division of exceptions into (i) good faith tort or broad public policy; (ii) implied contract or good faith contract; and (iii) narrow public policy;

Model III: a tripartite division of exceptions into (i) tort damages; (ii) contract damages; and (iii) broad public policy or good faith tort claim.²⁹⁷

When the effect of liability on total employment was estimated, they found that both the tort and contract doctrines had a significant negative effect on employment under Model I, the broad public policy and good faith doctrine had a significant negative effect under Model II, and the tort doctrine had a significant negative effect under Model III.²⁹⁸ Dertouzos and Karoly also estimated the model for separate industrial sectors²⁹⁹ and separately for large and small employers. In general, they found that adoption of common law exceptions to employment-at-will had a significant, negative impact on gross state product, suggesting that the social cost of wrongful discharge suits is large.³⁰⁰

297. *Id.* at 8-9.

298. *Id.*, tbl. 5.2, at 50.

299. *Id.*, tbl. 5.3, at 34 (including estimates for the nonmanufacturing, manufacturing, service, retail, wholesale, and finance sectors).

300. *Id.* at 62-63. Specifically, they concluded that after states adopt the most liberal tort versions of the covenant of good faith and fair dealing and the broad public policy exceptions to employment-at-will, the following labor-market changes occur:

- Aggregate employment drops by 2 to 5%. This result is insensitive to the use of alternative models, statistical assumptions, and econometric methodologies.
- Employment reductions are even higher in some nonmanufacturing industries, particularly the service sector, the retail trade, and the financial, insurance, and real estate group. This difference could stem from a variety of factors. Possible explanations include less frequent union protection, higher expected damage claims by dismissed employees due to greater levels of skills that are not transferable to other firms, systematic differences in management organization, and differences in the availability of objective criteria for evaluating job performance
- The decline in employment appears to be greater for larger businesses, i.e., those having more than 250 workers. This suggests that most costs associated with wrongful termination are not fixed (that is, the

As noted earlier, Dertouzos and Karoly used a different method of characterizing common law doctrines and different dates.³⁰¹ Of particular interest is their choice of a model which examines the influence of particular common law changes on such aggregate variables as state level employment and which uses years as the period of observation. The choice of an aggregate analysis is a natural one, suggested by the state-by-state nature of change in the common law. As discussed below, this choice requires some trade-offs and assumptions about the impact of the common law, which each researcher must evaluate in the context of her particular project. Similarly, the choice of an annual basis for observations loses some information known about court decisions, since the date on which an opinion is issued is known.³⁰² While this loss may be justified in the context of a particular project, it must inevitably result in some loss of precision in estimating the impact of a decision, since a decision adopted December 31st is treated the same as one issued the preceding January 1st.

Only limited testing of the sensitivity of Dertouzos and Karoly's results to alternative dating methods is possible.³⁰³ Table 20 shows that using my dating methods changes the results somewhat. The impact of the contract cause of action on employment in Model I goes from being negative and marginally significant to being positive and insignificant, while impact of the Model II broad public policy exception becomes larger and more significant, and the impact of the Model II implied contract/good faith exception goes from positive to negative, although it is insignificant under both methods.

Table 20 Correlations Across Different Methods

	Public Policy		Implied Contract		Implied Covenant	
	Morriss	Krueger	Morriss	Krueger	Morriss	Krueger
Morriss	--	0.85	--	0.67	--	0.81
RAND	0.75	0.83	0.72	0.76	0.94	0.86

same regardless of the number of employees), but, rather, vary on a per-employee basis.

Id. at 62-63.

301. See *supra* note 208-11 and accompanying text.

302. This is different from positing a lag in the effect of a legal change, since one can lag the indicator variables regardless of the period chosen.

303. Lynn Karoly kindly reestimated this model using my alternate dates and provided me with the results.

IV. CONCLUSIONS

Empirical research on the development of the common law and the impact of common law changes on the economy promises significant rewards. Not only will it lead to greater understanding of how and why the common law changes, but it can contribute to the assessment of the costs and benefits of those changes. Without such empirical evaluation, economics' contribution to understanding the law remains incomplete. Conducting such research requires the development of an analytical framework for dating changes in the common law.

The discussion of the empirical analyses of the development of wrongful discharge law demonstrates three important things. First, the method of dating common law changes does matter when those changes are included in empirical work. Researchers must therefore take care in dating those changes. Second, although dating matters, it does not matter too much. If the conclusions in these case studies dramatically changed, it would suggest that the results were so sensitive as to be driven by the dating methodology.³⁰⁴ The closeness of results reassures us that empirical work is possible. It is encouraging that three quite different research methods, ranging from Krueger's complete reliance on secondary sources to the different counting methods Dertouzos and Karoly and I used, produced results which were not incompatible. Finally, the existence of differences suggests the need for a framework for making these choices. Such a framework would both ensure consistency and allow readers to evaluate the validity of the research design.

The results presented in Part III of this Article are sufficiently likely to be generalizable that empirical researchers should, as a minimum, make explicit the methodology they use to select cases *and* the case citations they rely upon. Good practice should include additional elaboration of the choices made in dating; the reader should not be required to perform original research to evaluate the reasonableness of these choices. Where space does not permit the publication of such explanatory material with the original report of the results, in, for example, an article published in an economics journal, it should be stated in the article that such material is available on request.³⁰⁵ The peer review of such papers should include

304. This consistency, however, may simply be an artifact of these particular papers, so it is important not to allow overconfidence to encourage sloppy research methods.

305. See generally Richard S. Markovits, *Second Best Theory and the Standard Analysis*

legally trained reviewers, who are more likely to detect errors in dating methodology.

The eighteen principles suggested above provide a framework for making clear the research choices inevitable in empirical work which includes information on the common law. Those choices have a clear impact on the results, and it is therefore important that they be made visibly, carefully, and consistently with the theory which underlies the analysis. These principles are only a first step, however. Much research is needed before empirical work which includes common law events as either independent or dependent variables will be capable of being judged reliably by readers. Future work in this area should also include the collation of data on court structure and caseloads and distribution of such information through vehicles such as the Interuniversity Consortium on Political and Social Research.

The costs of such steps would not be trivial. Conducting the legal research for this paper, for example, consumed considerable effort, as I investigated the law in each U.S. jurisdiction. Without such an investment, however, the results are both unstable and untrustworthy. Economics has often been accused of imperialistic designs on other disciplines, including the law. It is time for economics to acknowledge that its conquest cannot be complete and that "law and economics" must truly be law *and* economics, not just economic analysis of law.

of Monopoly Rent Seeking: A Generalizable Critique, A 'Sociological' Account, and Some Illustrative Examples, 78 IOWA L. REV. 327 (1992), for an analysis of the difficulty of publishing nontraditional law and economics analysis.

Appendix A: Votes in *Teague* Supreme Court Cases

Case	Rule	New	Old
<i>Teague</i>	Sixth Amendment fair cross section requirement applies to petit juries	Blackmun* Kennedy O'Connor Rehnquist Scalia White**	Brennan Marshall Stevens
<i>Penry</i>	Jury instructions required on consideration of mitigating evidence	Kennedy Rehnquist Scalia White	Brennan Blackmun Marshall O'Connor Stevens
<i>Penry</i>	Eighth Amendment bars execution of retarded defendants	Blackmun Kennedy O'Connor Rehnquist Scalia Stevens White	Brennan Marshall
<i>Sawyer</i>	Prosecutorial comments during jury argument concerning juror's responsibilities barred by Eighth Amendment	Kennedy O'Connor Rehnquist Scalia White	Blackmun Brennan Marshall Stevens
<i>Butler</i>	Fifth Amendment bars police initiated interrogation following a suspect's request for counsel in the context of a separate investigation	Kennedy O'Connor Rehnquist Scalia White	Blackmun Brennan Marshall Stevens
<i>Saffle</i>	Eighth Amendment requires jury be allowed to base sentencing decision upon sympathy they feel for defendant after hearing his mitigating evidence	Kennedy O'Connor Rehnquist Scalia White	Blackmun Brennan Marshall Stevens
<i>Stringer</i>	Use of aggravating factor in sentencing of "heinous, atrocious, or cruel" conduct was so vague as to violate Eighth Amendment	Blackmun Kennedy O'Connor Rehnquist Stevens White	Scalia Souter Thomas
<i>Graham</i>	Constitutionality of Texas jury instructions on mitigating evidence	Kennedy Rehnquist Scalia Thomas White	Blackmun O'Connor Souter Stevens
<i>Gilmore</i>	Constitutionality of Illinois jury instruction on mitigating mental state	Kennedy O'Connor Rehnquist Scalia Thomas White	Blackmun & Stevens dissent on other grounds

* Attribution based on concurrence in result with respect to *Swain* claim.

** Attribution based on concurring opinion where White agrees test is properly applied but disputes whether test itself is proper.

Appendix B: Case Selection Notes

This appendix describes the specific cases I selected for the three exceptions to the at-will rule for each state. Where the state did not adopt the exception within the relevant time period, the text so indicates. Where my choices differ from those made by Krueger and Dertouzos and Karoly, I list their choices and explain briefly why I made the choice I did. The appendix covers the time period up to 1989, when my data ended. Both Dertouzos and Karoly's and Krueger's data ended in 1987,³⁰⁶ while mine continued through 1988. As a result, there are some states where I identified an opinion after their ending dates. Each citation includes the date of the opinion.

Alabama

1. *Public Policy*

This exception was not adopted in the period under study.

2. *Implied Contract*

I date the implied contract exception from *Hoffman-La Roche, Inc. v. Campbell* (7/10/87),³⁰⁷ as do Dertouzos and Karoly.

Krueger dates the implied contract exception from *Knox v. American Sterilizer Co.* (8/14/84).³⁰⁸ There the employee claimed that the employer breached the employment contract as defined by a handbook.³⁰⁹ The federal district court found that "it is apparent from the handbook that no such mutual *contractual* obligation was ever intended by the parties."³¹⁰ It then found that the employee had failed to provide any factual support for his claim that he did not receive everything he alleged the handbook promised.³¹¹ Sig-

306. DERTOUZOS & KAROLY, *supra* note 2, at 72; Krueger, *supra* note 8, at 654-55. Although Krueger's analysis covered through 1988, he lagged the adoption variables by one year, so the last adoption which counts for him is 1987. *Id.* at 657.

307. 512 So. 2d 725, 728-29 (Ala. 1987).

308. 117 L.R.R.M. (BNA) 2341 (M.D. Ala. 1984).

309. *Id.* at 2342.

310. *Id.* (emphasis in original).

311. *Id.*

nificantly, none of the benefits alleged to have been promised by the handbook (and mentioned by the district court) included protection from discharge.³¹² Moreover, the Alabama Supreme Court had made a similar determination twenty months earlier in *White v. Chelsea Industries* (1/21/83).³¹³ *White* is cited for this point (that review of the handbook indicates it is possible for the handbook to create a contract) by the Alabama Supreme Court in *Hoffman-La Roche*.³¹⁴ (Interestingly, *Hoffman-La Roche* does not cite *Knox* although it reviews Alabama cases as far back as the 1920s to support its analysis.)

The belief that *Knox* and *White* constitute the adoption of the implied contract exception to the at-will rule rests on the assumption that a court engaging in a review of the facts alleged would find some facts which could create a contract. This is too tenuous to support a public perception that the rule had changed in light of longstanding Alabama law allowing permanent contracts where additional consideration was supplied by the employee³¹⁵ and Alabama's steadfast refusal to adopt a public policy exception.³¹⁶

3. Implied Covenant of Good Faith and Fair Dealing

I date this exception from *Hoffman-La Roche, Inc. v. Campbell* (7/10/87).³¹⁷ Dertouzos and Karoly and Krueger cite no case.

Alaska

1. Public Policy

I use *Knight v. American Guard & Alert, Inc.* (2/21/86).³¹⁸ Dertouzos and Karoly also rely on this case. Krueger lists no case for a public policy exception.

312. *Id.*

313. 425 So. 2d 1090 (Ala. 1983).

314. *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987).

315. *See id.* (citing cases).

316. *Id.*

317. *Id.* at 725.

318. 714 P.2d 788 (Alaska 1986).

2. Implied Contract

I cite *Eales v. Tanana Valley Medical-Surgical Group* (5/27/83).³¹⁹ Krueger and Dertouzos and Karoly also cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

I use *Mitford v. de Lasala* (5/20/83),³²⁰ which explicitly adopts the implied covenant theory.³²¹ The Alaska Supreme Court cited *Mitford* as the primary case on the implied covenant theory in *Knight*.³²² Dertouzos and Kar also cite *Mitford*.

Krueger cites *Conway, Inc. v. Ross* (5/1/81)³²³ as support for the implied covenant of good faith and fair dealing. Although *Conway* discusses an implied covenant, it is the implied covenant that "the employee will do nothing which could tend to injure the employer's business interests."³²⁴ There is no mention of an implied covenant which would protect the employee. The specific claim was that a topless dancer engaged in an act of prostitution.³²⁵ Although the opinion discusses the need for good cause to fire the dancer, it does so because there was an explicit written term contract for the employee's services.³²⁶

Arizona

1. Public Policy

I cite *Wagenseller v. Scottsdale Memorial Hospital* (6/17/85).³²⁷ Krueger and Dertouzos and Karoly also cite this case.

319. 663 P.2d 958 (Alaska 1983).

320. 666 P.2d 1000 (Alaska 1983).

321. *Id.* at 1006-07.

322. *Knight*, 714 P.2d at 792.

323. 627 P.2d 1029 (Alaska 1981).

324. *Id.* at 1030.

325. *Id.*

326. *Id.*

327. 710 P.2d 1025 (Ariz. 1985).

2. Implied Contract

I date the exception from *Leikvold v. Valley View Community Hospital* (6/14/83), vacated (4/25/84).³²⁸ Krueger and Dertouzos and Karoly use the subsequent supreme court opinion; the exception was first recognized by the appellate court. The supreme court opinion substituted its own analysis of the case, but reached the same result as the appellate court.³²⁹

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Wagenseller v. Scottsdale Memorial Hospital* (6/17/85).³³⁰ Krueger does not cite a case for this exception; Dertouzos and Karoly cite this case.

Arkansas

1. Public Policy

In *M.B.M. Co. v. Counce* (3/24/80),³³¹ the Arkansas Supreme Court, although finding no claim on the facts before it, suggested that on different facts it might recognize an exception.³³² This was acknowledged by the Arkansas Supreme Court in *Sterling Drug, Inc. v. Oxford* (1/19/88),³³³ where the court said "In *Counce, supra*, we acknowledged that we might recognize an exception [based on public policy] to the at-will doctrine" for some circumstances.³³⁴ Dertouzos and Karoly cite *Counce* for a narrow public policy exception and *Sterling Drug* for a broad exception.

Krueger cites *Scholtes v. Signal Delivery Service, Inc.* (9/21/82),³³⁵ which made an *Erie* guess that Arkansas would recognize an exception to the at-will rule for four classes of public policy violations.³³⁶ A similar *Erie* guess was made by the Eighth

328. 688 P.2d 201 (Ariz. App. 1983), vacated, 688 P.2d 170 (Ariz. 1984).

329. *Leikvold*, 688 P.2d at 174.

330. 710 P.2d 1025 (Ariz. 1985).

331. 596 S.W.2d 681 (Ark. 1980).

332. *Id.* at 683.

333. 743 S.W.2d 380 (Ark. 1988).

334. *Id.* at 383.

335. 548 F. Supp. 487 (W.D. Ark. 1982).

336. *Id.* at 494. The four classes of public policy violations are:

Circuit in *Lucas v. Brown & Root, Inc.*³³⁷ Scholtes' Erie guess was based on a citation to *Counce* and references to other jurisdictions.³³⁸ *Counce* is thus the more appropriate basis for the doctrine.

2. Implied Contract

I cite *Jackson v. Kinark Corp.* (6/4/84).³³⁹ Dertouzos and Karoly cite *Griffin v. Erickson* (11/22/82).³⁴⁰ Krueger cites *French v. Dillard Department Stores* (4/1/85).³⁴¹

In *French*, the Arkansas Supreme Court found that a particular profit-sharing plan did not create the conditions under which an exception might be made to the at-will rule. In that case, the employee had signed a written employment application which included the statement "I understand and agree that Dillard's may terminate my employment at any time, without prior notice or liability of any kind, except for wages earned and unpaid at the time of such termination."³⁴² Similar positions had been taken by the court in both *Griffin* and *Jackson*, which predated *French*.³⁴³

In *Griffin*, however, the court avoided the question of whether a handbook claim could be made by finding that the employee had received all the process he was due under the public employer's rules and that cause to discharge him existed.³⁴⁴ In addition, *Griffin* involved a claim by a public employee, making the issue of procedural fairness particularly important.³⁴⁵ It is interesting to

(1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases in which employees are discharged in violation of the general public policy of the state.

337. 736 F.2d 1202, 1204-05 (8th Cir. 1984).

338. *Scholtes*, 548 F. Supp. at 493.

339. 669 S.W.2d 898 (Ark. 1984).

340. 642 S.W.2d 308 (Ark. 1982).

341. 686 S.W.2d 435 (Ark. 1985).

342. *Id.* at 436.

343. *Jackson*, 669 S.W.2d at 899 (stating the common law rule that a contract of employment for an indefinite term is subject to at-will termination even if it contains a "for cause" provision, but recognizing a trend towards a less harsh rule); *Griffin*, 642 S.W.2d at 311 (finding that an employee not claiming to have been employed for a definite term is subject to termination without cause).

344. *Griffin*, 642 S.W.2d at 311.

345. *Id.* at 309. The Court held that the at-will rule did apply to public as well as

note that the BNA *Labor Relations Reference Manual* reporter digests the case under the headnote "Wrongful Discharge—Public Employee,"³⁴⁶ while the West reporter headnotes concerning the manual are listed under Municipal Corporations key numbers, and the West Master and Servant headnotes all simply affirm the at-will rule.³⁴⁷

In *Jackson*, the Court reversed a summary judgment in favor of the employer to allow development of a factual record on which to base the decision.³⁴⁸ *French* later referred to "the *Jackson* exceptions" to the at-will rule.³⁴⁹ *Jackson* is thus the more appropriate source of the handbook exception.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

California

1. Public Policy

California adopted the first public policy exception in the United States in *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396* (9/30/59).³⁵⁰ Dertouzos and Karoly cite this as establishing a narrow public policy exception. Krueger cites *Tameny v. Atlantic Richfield Co.* (6/2/80),³⁵¹ which Dertouzos and Karoly cite as a broad public policy exception. *Tameny* explicitly relies on

private employees. *Id.* at 310. However, the fact that the case involved a public employer would tend to favor an employee's claim based on an official document since an employee may acquire a constitutionally protected property interest in public employment if the public employer has restricted its ability to discharge employees. See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972) (recounting Supreme Court holdings in which a property interest in public employment has been recognized where a legitimate expectation of private employment exists); *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (stating that a property interest in employment protected by the Fourteenth Amendment may exist absent an explicit contractual provision regarding continued employment).

346. *Griffin v. Erickson*, 115 L.R.R.M. (BNA) 4300, 4300 (1982).

347. *Griffin*, 642 S.W.2d at 308-09.

348. *Jackson v. Kinark Corp.*, 669 S.W.2d 898, 899-900 (Ark. 1984).

349. *French v. Dillard Dep't Stores*, 686 S.W.2d 435, 436 (Ark. 1985).

350. 344 P.2d 25 (Cal. Ct. App. 1959).

351. 610 P.2d 1330 (Cal. 1980).

Petermann, and notes that the major question is whether the public policy-based claim sounds in tort or contract, not whether the exception exists.³⁵²

2. Implied Contract

I use *Rabago-Alvarez v. Dart Industries* (2/6/76)³⁵³ to date the implied contract exception. Krueger also cites this case. Dertouzos and Karoly cite *Drzewiecki v. H. & R. Block, Inc.* (3/31/72).³⁵⁴

Rabago-Alvarez cites *Drzewiecki* for its statement that “a contract for permanent employment, whether or not it is based on some consideration other than the employee’s services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary.”³⁵⁵ The cited passage comes from *Drzewiecki*’s analysis of an employer’s claim that a contract which purported to be “permanent” must therefore be at-will.³⁵⁶ The court rejected that claim, instead finding that the written contract which specified that termination could occur only if the employee were “improperly conducting the business” limited the employer’s ability to discharge the employee.³⁵⁷ No state had adopted the implied contract theory in 1972. *Drzewiecki* involved an explicit written employment contract, rather than an employee manual or oral promises.³⁵⁸ Under those circumstances, relying on a general statement like the one quoted from a case is an inappropriate basis for the creation of the exception.

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Cleary v. American Airlines, Inc.* (10/29/80).³⁵⁹ Krueger and Dertouzos and Karoly also cite this case. Dertouzos and Karoly also cite *Foley v. Interactive Data Corp.* (12/29/88).³⁶⁰

352. *Id.* at 1334-35.

353. 127 Cal. Rptr. 222 (Cal. Ct. App. 1976).

354. 101 Cal. Rptr. 169 (Cal. Ct. App. 1972).

355. *Rabago-Alvarez*, 127 Cal. Rptr. at 225 (quoting *Drzewiecki*, 101 Cal. Rptr. at 174, 24 Cal. App. 3d at 704).

356. *Drzewiecki*, 101 Cal. Rptr. at 173.

357. *Id.* at 171, 174-75.

358. *Id.* at 170-71.

359. 168 Cal. Rptr. 722 (Cal. Ct. App. 1980).

360. 765 P.2d 373 (Cal. 1988).

which restricted the damages available for breach of the covenant to contract damages, while *Cleary* had allowed tort damages.³⁶¹ Since all observations in the sample are from before December 1988, the change is unimportant for my purposes.

Colorado

1. Public Policy

I use *Winther v. DEC International, Inc.* (9/18/85).³⁶² *Winther* contains the type of careful and thorough analysis which would have created the expectation among employers that the public policy exception was now available in Colorado courts.³⁶³ *Brooks v. Trans World Airlines, Inc.* (10/18/83), an earlier federal opinion, also found a public policy exception to exist in dicta.³⁶⁴ *Brooks* cited *Lampe v. Presbyterian Medical Center* as the source of a public policy exception based on discharges for exercising a "specifically enacted right or duty."³⁶⁵ This is a misstatement of the *Lampe* court's discussion of cases from other jurisdictions, which it then distinguished from the facts before it.³⁶⁶ The exception should therefore date from *Winther* rather than *Lampe* or *Brooks*.

Krueger does not count Colorado as having adopted the public policy exception. Dertouzos and Karoly, who do not rely on federal court opinions, cite *Cronk v. Intermountain Rural Electric Ass'n* (7/1/88).³⁶⁷

2. Implied Contract

I cite *Brooks v. Trans World Airlines, Inc.* (10/18/83).³⁶⁸ Krueger and Dertouzos and Karoly cite *Salimi v. Farmers Insur-*

361. *Cleary*, 168 Cal. Rptr. at 729.

362. 625 F. Supp. 100 (D. Colo. 1985).

363. *See id.* at 104.

364. 574 F. Supp. 805, 808-10 (D. Colo. 1983) (the facts concerned an employment manual).

365. *Id.* at 809 (citing *Lampe v. Presbyterian Medical Ctr.*, 590 P.2d 513, 515 (Colo. App. 1978)).

366. *See Lampe*, 590 P.2d at 515.

367. 765 P.2d 619 (Colo. Ct. App. 1988).

368. 574 F. Supp. 805 (D. Colo. 1983).

ance Group (6/14/84).³⁶⁹ Although *Brooks'* analysis of *Lampe* was mistaken,³⁷⁰ the remainder of its argument that an implied contract exception would be found by the Colorado courts is well reasoned.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Connecticut

1. Public Policy

I date the exception from *Sheets v. Teddy's Frosted Foods, Inc.* (1/22/80).³⁷¹ Dertouzos and Karoly and Krueger³⁷² also cite this opinion.

2. Implied Contract

I date this exception from *Finley v. Aetna Life & Casualty Co.* (10/1/85), which was later reversed by the Connecticut Supreme Court on January 27, 1987.³⁷³ Krueger cites *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School* (2/3/87).³⁷⁴ Dertouzos and Karoly cite *Magnan v. Anaconda Industries* (7/3/84).³⁷⁵

As both the supreme court and the appellate court in *D'Ulisse-Cupo* note, *Finley* had already applied a similar theory to an employee handbook.³⁷⁶ The *D'Ulisse-Cupo* appeals court summarized the appellate court opinion in *Finley* by saying "Finley thus

369. 684 P.2d 264 (Colo. Ct. App. 1984).

370. See *supra* notes 366-67 and accompanying text.

371. 427 A.2d 385 (Conn. 1980).

372. Krueger lists the opinion as *Sheets v. Teddy's Frosted Flakes*. Krueger, *supra* note 8, unpublished appendix (on file with author).

373. 499 A.2d 64 (Conn. App. Ct. 1985), *rev'd*, 520 A.2d 208 (Conn. 1987).

374. 520 A.2d 217 (Conn. 1987).

375. 479 A.2d 781 (Conn. 1984).

376. See *D'Ulisse-Cupo*, 520 A.2d at 221 n.3; *D'Ulisse-Cupo v. Board of Directors of Notre Dame High Sch.*, 503 A.2d 1192, 1196 (Conn. App. Ct. 1986), *aff'd in part and rev'd in part*, 520 A.2d 217 (Conn. 1987).

establishes that an employer may be bound by an implied promise to fire an employee [only] for cause if the employee reasonably relies on that promise."³⁷⁷ *Finley* is thus clearly the more appropriate basis for the exception.

While discussing the general erosion of the at-will rule in the United States in *Magnan* the Connecticut Supreme Court states, in dicta:³⁷⁸

For those employees not protected by collective bargaining agreements, civil service statutes or other laws, the courts have occasionally found an implied promise to discharge only for cause in the circumstances of particular employment relationships. Sometimes the promise has been found in the representations contained in an employee relations manual or handbook. In appropriate circumstances, such an agreement may arise when an employee, in reliance on an implied representation that the position will not arbitrarily be terminated, leaves his current employment, or otherwise acts in reasonable and significant reliance on the representation.³⁷⁹

Although the appellate court in *Finley* relies on this dicta in the same manner as *Dertouzos* and *Karoly*,³⁸⁰ the dicta is so vague and limited by the condition that the employee act in reliance on the representation that I date the exception from *Finley* rather than from the *Magnan* dicta.

3. Implied Covenant of Good Faith and Fair Dealing

I use *Magnan v. Anaconda Industries* (6/10/80), reversed and remanded on other grounds (7/3/84).³⁸¹ The trial court rejected an employer's request for summary judgment, noting that an implied

377. *D'Ulisse-Cupo*, 503 A.2d at 1196.

378. The *Dertouzos* and *Karoly* appendix identifies some opinions as containing the rule in dicta. See DERTOUZOS & KAROLY, *supra* note 2, at 67-71. The appendix does not indicate that they considered *Magnan* to have adopted the rule in dicta. *Id.* at 68.

379. *Magnan*, 479 A.2d at 785 (footnote omitted).

380. See *Finley v. Aetna Life & Casualty Co.*, 499 A.2d 64, 73 (Conn. App. Ct. 1985), *rev'd* 520 A.2d 208 (Conn. 1987).

381. 429 A.2d 492 (Conn. Super. Ct. 1980), *rev'd and remanded on other grounds*, 479 A.2d 781 (Conn. 1984).

covenant of good faith and fair dealing existed in employment contracts under Connecticut law.³⁸² The court did not delineate the boundaries of the covenant.³⁸³ When the case reached the state supreme court several years later, after trial, the supreme court restricted the covenant to public policy violations in the case of at-will contracts.³⁸⁴ It did not disavow the existence of the covenant as a separate basis for recovery where a contract provision existed to give it content, suggesting (in dicta) approval for the manner in which the Massachusetts courts had applied the covenant.³⁸⁵

Dertouzos and Karoly cite *Cook v. Alexander & Alexander of Connecticut, Inc.* (1/16/85).³⁸⁶ That case in turn cites the above mentioned dicta from the state supreme court opinion in *Magnan*.³⁸⁷ Krueger also cites the Connecticut Supreme Court opinion in *Magnan*.³⁸⁸

Delaware

Delaware did not recognize any common law exceptions to the at-will rule in the period under study.

District of Columbia

Krueger and Dertouzos and Karoly do not include the District in their analyses.

1. *Public Policy*

I use *Newman v. Legal Services Corp.* (1/26/86).³⁸⁹ In this case the federal court is making an *Erie* guess about District law,

382. *Id.* at 493-94.

383. *Id.*

384. *Magnan v. Anaconda Indus.* 479 A.2d 781, 789 (Conn. 1984).

385. *Id.*

386. 488 A.2d 1295 (Conn. Super. Ct. 1985).

387. *Id.* at 1279.

388. Krueger incorrectly cites the case as "*Magnan*". See Krueger, *supra* note 8, unpublished appendix (on file with author). Also, although he did not identify which opinion he used, his data showed that it was the supreme court opinion. *Id.*

389. 628 F. Supp. 535 (D.D.C. 1986).

rather than a District of Columbia court deciding the issue directly.

2. Implied Contract

I cite *Washington Welfare Ass'n v. Wheeler* (8/12/85).³⁹⁰ There are two earlier District cases which BNA cites as implied contract cases.³⁹¹ Both involved university faculty and interpretation of faculty rules in relatively specific ways. In *Bason v. American University*,³⁹² the court noted that both parties agreed that the faculty handbook in question was part of the contract, and the dispute was over the interpretation of the manual's language. In *Howard University v. Best*,³⁹³ the parties differed over what tenure category a faculty member fell into, not whether the handbook was part of the contract. *Washington Welfare*, which addressed the substantive issue of implying a contract directly, did not cite either case.³⁹⁴ Because of the special circumstances of *Bason* and *Best* and the lack of general language in either, I date the exception from *Washington Welfare*.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Florida

Florida did not recognize any common law exceptions to the at-will rule in the period under study.

Georgia

Georgia did not recognize any common law exceptions to the at-will rule in the period under study.

390. 496 A.2d 613 (D.C. 1985).

391. See *infra* notes 392-93 and accompanying text.

392. 414 A.2d 522, 523, 525 (D.C. 1980).

393. 484 A.2d 958, 966 (D.C. 1984).

394. See *Washington Welfare*, 496 A.2d 613.

*Hawaii*1. *Public Policy*

I date this exception from *Parnar v. Americana Hotels, Inc.* (10/28/82).³⁹⁵ Dertouzos and Karoly and Krueger also cite this case.

2. *Implied Contract*

I use *Kinoshita v. Canadian Pacific Airlines* (8/26/86).³⁹⁶ Krueger does not cite a case for this exception. Dertouzos and Karoly cite this case.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

*Idaho*1. *Public Policy*

I cite *Jackson v. Minidoka Irrigation District* (4/21/77).³⁹⁷ Dertouzos and Karoly also cite this case. Krueger cites *MacNeil v. Minidoka Memorial Hospital* (4/28/85).³⁹⁸

In dicta in *Jackson*, the Idaho Supreme Court stated “[a]s a general exception to the [at-will] rule . . . an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.”³⁹⁹ On the particular facts of the case, however, the court found there was no violation of public policy.⁴⁰⁰ *MacNeil* relies on *Jackson* as the source of the rule.⁴⁰¹

395. 652 P.2d 625 (Haw. 1982).

396. 724 P.2d 110 (Haw. 1986).

397. 563 P.2d 54 (Idaho 1977).

398. 701 P.2d 208 (Idaho 1985).

399. *Jackson*, 563 P.2d at 57.

400. *Id.* at 58.

401. *MacNeil*, 701 P.2d at 209.

2. Implied Contract

I use *Jackson v. Minidoka Irrigation District* (4/21/77).⁴⁰² Dertouzos and Karoly and Krueger also cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Metcalf v. Intermountain Gas Co.* (8/8/89).⁴⁰³ Dertouzos and Karoly also cite this opinion. It is after Krueger's time period; he cites no case for this exception.

Illinois

1. Public Policy

I date this exception from *Kelsay v. Motorola, Inc.* (12/4/78).⁴⁰⁴ Dertouzos and Karoly cite this case for a narrow public policy exception. Krueger cites *Palmateer v. International Harvester Co.* (original opinion 4/17/81, modified 6/8/81).⁴⁰⁵ Dertouzos and Karoly cite this case for a broad public policy exception.

In *Kelsay*, the court reversed a lower court ruling that an employee discharged in retaliation for filing a worker's compensation claim had no claim.⁴⁰⁶ The Illinois Supreme Court found a common law remedy independent of the statutory scheme (which at that time did not provide a retaliatory discharge cause of action).⁴⁰⁷ The Illinois Supreme Court later accepted the appeal in *Palmateer* "to determine the contours of the tort of retaliatory discharge approved in *Kelsay v. Motorola, Inc.*"⁴⁰⁸ Prior to the Illinois Supreme Court opinion in *Kelsay*, an appellate panel had recognized a public policy exception in a workers' compensation retaliation case in *Leach v. Lauhoff Grain Co.* ((8/31/77)).⁴⁰⁹ This

402. 563 P.2d 54 (Idaho 1977).

403. 778 P.2d 744 (Idaho 1989).

404. 384 N.E.2d 353 (Ill. 1978).

405. 421 N.E.2d 876 (Ill. 1981).

406. *Kelsay*, 384 N.E.2d at 361.

407. *Id.* at 358-59.

408. *Palmateer*, 421 N.E.2d at 877.

409. 366 N.E.2d 1145, 1148 (Ill. App. Ct. 1977).

case was decided the same day as the appellate court opinion in *Kelsay*,⁴¹⁰ in which the court had ruled for the employer. Given the simultaneous and conflicting decisions and the workers' compensation context, I date the exception from the Illinois Supreme Court opinion in *Kelsay*.

2. Implied Contract

I cite *Carter v. Kaskaskia Community Action Agency* (12/20/74).⁴¹¹ Dertouzos and Karoly cite *Duldulao v. St. Mary of Nazareth Hospital Center* (1/30/87).⁴¹² Krueger cites *Pundt v. Millikin University* (7/22/86).⁴¹³

Illinois' intermediate appellate courts issued a number of decisions on whether a contract could be implied from an employee handbook or other material before the matter was settled in favor of the implied contract exception by the Illinois Supreme Court in *Duldulao*.⁴¹⁴ *Duldulao* cites *Carter* as the first case to create the exception⁴¹⁵ and most post-*Carter* cases cite it, distinguishing it if they find no contract and applying it if they find a contract.⁴¹⁶ *Pundt* is a post-*Duldulao* case and therefore clearly inappropriate. Given the goal of identifying the decisions which introduced the uncertainty into the employer's decision process, *Carter* is the appropriate source.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

410. 366 N.E.2d 1141 (Ill. App. Ct. 1977), *rev'd* 384 N.E.2d 353 (Ill. 1978).

411. 322 N.E.2d 574 (Ill. App. Ct. 1974).

412. 505 N.E.2d 314 (Ill. 1987).

413. 496 N.E.2d 291 (Ill. App. Ct. 1986).

414. *See Duldulao*, 505 N.E.2d at 317.

415. *Id.*

416. *See, e.g., Sargent v. Illinois Inst. of Technology*, 397 N.E.2d 443, 446 (Ill. App. Ct. 1979) (distinguishing *Carter v. Kaskaskia Community Action Agency*, 322 N.E.2d 547 (Ill. App. Ct. 1974)); *Kaiser v. Dixon*, 468 N.E.2d 822, 830-32 (Ill. App. Ct. 1984) (rejecting the *Sargent* distinction).

*Indiana*1. *Public Policy*

I date this exception from *Frampton v. Central Indiana Gas Co.* (5/1/73).⁴¹⁷ Dertouzos and Karoly also cite this case for a narrow public policy exception. Krueger cites *Campbell v. Eli Lilly and Co.* (12/30/80).⁴¹⁸

Frampton concerned the interpretation of the Indiana workers' compensation statute. It held that a retaliatory discharge was a "device" within the meaning of the word in the statute and therefore prohibited by the language "[n]o contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act."⁴¹⁹

The court, however, used very broad language to define the cause of action, stating that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general [at-will] rule must be recognized."⁴²⁰ The case is frequently cited as an example of a public policy claim.⁴²¹ In addition, the *Campbell* court based its analysis of the facts on *Frampton*.⁴²² *Frampton* is thus the appropriate basis for dating the exception.

2. *Implied Contract*

I use *Romack v. Public Service Co. of Indiana* (8/20/87).⁴²³ Dertouzos and Karoly also cite this case. Krueger does not list this exception as adopted.

417. 297 N.E.2d 425 (Ind. 1973).

418. 413 N.E.2d 1054 (Ind. Ct. App. 1980).

419. *Frampton*, 297 N.E.2d at 427-28 (quoting IND. ANN. STAT. § 40-1215 (emphasis by the court)).

420. *Id.* at 428.

421. *See, e.g., Campbell*, 413 N.E.2d at 1060-62.

422. *Id.*

423. 511 N.E.2d 1024 (Ind. 1987).

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Iowa

1. *Public Policy*

Northrup v. Farmland Industries, Inc. (7/31/85).⁴²⁴ Dertouzos and Karoly also cite this case. Krueger does not count this exception as adopted.

In *Northrup*, the Iowa Supreme Court says that it had previously "hinted" that it would recognize a public policy exception under the right circumstances.⁴²⁵ As in *Abrisz*, however, the *Northrup* court found that facts did not support a public policy claim.⁴²⁶ The exception was finally adopted in *Springer v. Weeks & Leo Co.* (9/21/88).⁴²⁷ *Abrisz* is discussed as an example in the text and is not used for the reasons given there.⁴²⁸

2. *Implied Contract*

I cite *Young v. Cedar County Work Activity Ctr., Inc.* (11/25/87).⁴²⁹ Krueger does not consider this exception to have been adopted. Dertouzos and Karoly also cite this case.

3. *Implied Covenant of Good Faith and Fair Dealing*

Both Dertouzos and Karoly and I do not consider this exception to have been adopted in Iowa. Krueger cites the federal district court opinion in *High v. Sperry Corp.* (3/16/84).⁴³⁰

424. 372 N.W.2d 193 (Iowa 1985).

425. *Id.* at 196 (citing *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978)).

426. *Id.* at 196-97 (noting that the public policy claim of discrimination against disabilities was preempted by a statutory remedy for such discrimination).

427. 429 N.W.2d 558, 560 (Iowa 1988).

428. See *supra* notes 143-45 and accompanying text.

429. 418 N.W.2d 844 (Iowa 1987).

430. 581 F. Supp. 1246, 1248 (S.D. Iowa 1984).

High refused to dismiss for failure to state a claim a cause of action which sought recovery under the implied covenant theory, noting that "[t]he terms of the employment relationship between plaintiff and defendant are not before the court. Perhaps plaintiff can prove an employment relationship and other facts giving rise to a cause of action for breach of an implied covenant of good faith and fair dealing."⁴³¹ Given the extremely low standard for preventing dismissal on these grounds,⁴³² this can hardly be said to have created an expectation that such a cause of action exists in Iowa.⁴³³

Kansas

1. Public Policy

I cite *Murphy v. City of Topeka-Shawnee County Department of Labor Services* (6/19/81).⁴³⁴ Krueger cites this opinion; Dertouzos and Karoly list it as the source of a narrow public policy exception. Dertouzos and Karoly cite *Palmer v. Brown* (3/25/88)⁴³⁵ as the source of a broad public policy exception.

2. Implied Contract

I use *Allegri v. Providence-St. Margaret Health Center* (8/2/84).⁴³⁶ Dertouzos and Karoly and Krueger both cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Kentucky

431. *Id.* at 1248.

432. Dismissal for failure to state a claim under Federal Rule 12(b)(6) is granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

433. See *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 457 (Iowa 1989) (noting that the question of the acceptance of the exception was still undecided and declining to decide it).

434. 630 P.2d 186 (Kan. Ct. App. 1981).

435. 752 P.2d 685 (Kan. 1988).

436. 684 P.2d 1031 (Kan. Ct. App. 1984).

1. Public Policy

I cite *Firestone Textile Co. v. Meadows* (11/23/83).⁴³⁷ Krueger and Dertouzos and Karoly also cite this case.

Firestone cites two appellate opinions as support.⁴³⁸ *Pari-Mutuel Clerks' Union of Kentucky, Local 541 v. Kentucky Jockey Club*⁴³⁹ and *Scroghan v. Kraftco Corp.*⁴⁴⁰ The former finds a remedy based on a Kentucky statute prohibiting the discharge of an employee for supporting a union.⁴⁴¹ Although there was no explicit remedy provided by the statute, the court found an implied remedy existed.⁴⁴² The *Firestone* court stated that "[w]e have already recognized a cause of action for wrongful discharge based on public policy implicit in an act of the legislature."⁴⁴³ This analysis of *Pari-Mutuel* is difficult to sustain from the language of the case itself, and it would not be appropriate to date the exception from *Pari-Mutuel*.

Scroghan held that firing an employee who announced his intention to attend night law school did not involve a public policy question.⁴⁴⁴ Therefore, neither case suggested that a general public policy exception to the at-will rule existed.

2. Implied Contract

I use *Shah v. American Synthetic Rubber Corp.* (8/31/83).⁴⁴⁵ Krueger and Dertouzos and Karoly cite no case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

437. 666 S.W.2d 730 (Ky. 1983).

438. *Firestone*, 666 S.W.2d at 732.

439. 551 S.W.2d 801 (Ky. 1977).

440. 551 S.W.2d 811 (Ky. Ct. App. 1977).

441. *Pari-Mutuel Clerks'*, 551 S.W.2d at 802.

442. *Id.*

443. *Firestone*, 666 S.W.2d at 732 (citing *Pari-Mutuel*, 551 S.W.2d at 803).

444. *Scroghan*, 551 S.W.2d at 812.

445. 655 S.W.2d 489 (Ky. 1983).

Louisiana

Louisiana did not recognize any common law exceptions to the employment at-will rule in the period under study.

*Maine*1. *Public Policy*

This exception was not adopted in the period under study.

2. *Implied Contract*

I cite *Terrio v. Millinocket Community Hospital* (11/2/77).⁴⁴⁶ Krueger also cites this case. Dertouzos and Karoly cite *Larrabee v. Penobscot Frozen Foods, Inc.* (12/31/84).⁴⁴⁷

Terrio upheld a jury verdict for an employee who claimed an implied contract for a definite term based on a retirement plan, an employee handbook, and oral statements by supervisors.⁴⁴⁸ Although *Larrabee* did not mention *Terrio*, its main innovation was a relaxation of the evidentiary standard by which contracts can be taken out of the at-will rule.⁴⁴⁹ *Terrio* clearly adopted a somewhat more limited implied contract exception, but given the early date of its adoption its impact must have been relatively large.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

*Maryland*1. *Public Policy*

I cite *Adler v. American Standard Corp.* (7/16/81).⁴⁵⁰ Krueger

446. 379 A.2d 135 (Me. 1977).

447. 486 A.2d 97 (Me. 1984).

448. *Terrio*, 379 A.2d at 140.

449. *Larrabee*, 486 A.2d at 99-100.

450. 432 A.2d 464 (Md. 1981).

and Dertouzos and Karoly both cite this case.

2. Implied Contract

I use *Staggs v. Blue Cross of Maryland, Inc.* (1/14/85).⁴⁵¹ Dertouzos and Karoly also cite this case. Krueger cites *Staggs* but lists the date as 1987.⁴⁵²

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Massachusetts

1. Public Policy

I use *McKinney v. National Dairy Council* (5/28/80).⁴⁵³ Krueger and Dertouzos and Karoly cite *Cort v. Bristol-Meyers Co.* (2/18/82).⁴⁵⁴

McKinney carefully surveyed Massachusetts law and brought the public policy exception into the implied covenant context.⁴⁵⁵ Massachusetts courts quickly began to cite *McKinney*.⁴⁵⁶ *Cort* cites *Gram*,⁴⁵⁷ which cites *McKinney* in support of the exception.⁴⁵⁸ Therefore, *McKinney* is a better source of the exception than *Cort*.

451. 486 A.2d 798 (Md. Ct. Spec. App. 1985), *cert. denied*, 493 A.2d 349 (Md. 1985).

452. Krueger, *supra* note 8, unpublished appendix (on file with author). This appears to be a repeat of a typographical error in the BNA IER manual which correctly cites *Staggs* as 486 A.2d 798, but incorrectly lists the date as 1987 rather than 1985. BUREAU OF NATIONAL AFFAIRS, INDIVIDUAL EMPLOYMENT RIGHTS MANUAL 505:414 (June, 1993).

453. 491 F. Supp. 1108 (D. Mass. 1980).

454. 431 N.E.2d 908 (Mass. 1982).

455. *McKinney*, 491 F. Supp. at 1120-22. Massachusetts law is unique in this respect: the implied covenant is the source of the public policy exception. *See Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256-57 (Mass. 1977) (discussing the public policy exception in the context of an implied covenant of good faith and fair dealing). The Massachusetts Supreme Judicial Court eventually held that it was not necessary to instruct the jury on the covenant in public policy cases. *Mello v. Stop & Shop Co.*, 524 N.E.2d 105, 105 n.7 (Mass. 1988).

456. *See, e.g., Gram v. Liberty Mutual Ins. Co.*, 429 N.E.2d 21, 27 n.6 (Mass. 1981).

457. *Cort*, 431 N.E.2d at 910 (citing *Gram*, 429 N.E.2d at 21).

458. *See supra* note 456 and accompanying text.

2. Implied Contract

I cite *Hobson v. McLean Hospital Corp.* (5/16/88).⁴⁵⁹ Dertouzos and Karoly cite *Jackson v. Action for Boston Community Development, Inc.* (7/14/88).⁴⁶⁰ Krueger does not cite a case for this exception; these cases are outside the time period of his study.

Hobson cites no authority, but simply asserts the exception exists in Massachusetts.⁴⁶¹ *Jackson* cites *Hobson* as the source of the exception.⁴⁶² One earlier case deserves mention. The BNA *Individual Employment Rights Handbook* summarizes the three paragraph opinion in *Hass v. Picker International, Inc.*⁴⁶³ as allowing a claim based on "statements in an employee handbook and representations by the employer's agent that he [the employee] would be employed for a term in excess of a year."⁴⁶⁴ In fact, that opinion merely rejected a summary judgment motion, saying "although Plaintiff's evidence appears to be gossamer thin, it cannot be ruled with certainty that there is no question of material fact lurking in this case."⁴⁶⁵ Given the procedural posture, this is less than "gossamer thin" authority for the existence of such a cause of action in Massachusetts.

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Fortune v. National Cash Register Co.* (7/20/77).⁴⁶⁶ Krueger and Dertouzos and Karoly also cite this case.

459. 522 N.E.2d 975 (Mass. 1988).

460. 525 N.E.2d 411 (Mass. 1988).

461. *Hobson*, 522 N.E.2d at 977.

462. *Jackson*, 525 N.E.2d at 415 (citing *Hobson*, 522 N.E.2d at 977, 402 Mass. 413, 415).

463. 122 L.R.R.M. (BNA) 2367 (D. Mass. 1986).

464. BUREAU OF NATIONAL AFFAIRS, *INDIVIDUAL EMPLOYMENT RIGHTS MANUAL* 505:434 (January, 1991).

465. *Hass*, 122 L.R.R.M. at 2368.

466. 364 N.E.2d 1251 (Mass. 1977).

*Michigan*1. *Public Policy*

I use *Sventko v. Kroger Co.* (6/24/76).⁴⁶⁷ Krueger and Dertouzos and Karoly also cite this case.

2. *Implied Contract*

I cite *Toussaint v. Blue Cross and Blue Shield of Michigan* (6/10/80).⁴⁶⁸ Krueger and Dertouzos and Karoly also cite this case. The Michigan Supreme Court opinion in *Toussaint* actually decided two cases, one involving Toussaint and the other a plaintiff named Ebling.⁴⁶⁹ In the appellate court Ebling won and Toussaint lost. The appellate opinion in *Toussaint* was published.⁴⁷⁰ The appellate opinion in Ebling was not. It was issued on 11/9/77. I date the exception from the Supreme Court opinion for the reasons discussed above concerning the Illinois cases of *Leach* and *Kelsay*.⁴⁷¹

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

*Minnesota*1. *Public Policy*

I use *Phipps v. Clark Oil & Refining Co.* (11/18/86).⁴⁷² Dertouzos and Karoly and Krueger also cite this case.⁴⁷³

467. 245 N.W.2d 151 (Mich. 1976).

468. 292 N.W.2d 880 (Mich. 1980).

469. *Id.* at 883.

470. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 262 N.W.2d 848 (Mich. App. 1977) (11/8/77).

471. *See supra* notes 404-10 and accompanying text.

472. 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd* 408 N.W.2d 569 (Minn. 1987) (in an opinion dated 6/26/87).

473. Although Krueger did not identify which of the two opinions he counted in his list, his data showed that it was the intermediate appellate opinion. *See* Krueger, *supra* note 8, tbl. 1, at 649 (illustrating the years that Krueger uses as the starting point of the recognition of the at-will doctrine in each state; thus, implying which cases Krueger relies

2. *Implied Contract*

I use *Pine River State Bank v. Mettille* (4/29/83).⁴⁷⁴ Krueger and Dertouzos and Karoly also cite this opinion.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Mississippi

1. *Public Policy*

I cite *Laws v. Aetna Finance Co.* (7/17/87).⁴⁷⁵ The *Laws* court gives an exhaustive analysis of state court dicta and makes a convincing argument that Mississippi would adopt a public policy exception for employees discharged for refusal to commit an illegal act.⁴⁷⁶ Krueger and Dertouzos and Karoly do not consider this exception to have been adopted in Mississippi.

2. *Implied Contract*

This exception was not adopted in the period under study.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Missouri

1. *Public Policy*

I date this exception from *Boyle v. Vista Eyewear, Inc.* (11/5/85).⁴⁷⁷ Dertouzos and Karoly also cite this case. Krueger

on).

474. 333 N.W.2d 622 (Minn. 1983).

475. 667 F. Supp. 342 (N.D. Miss. 1987).

476. *Id.* at 345-46.

477. 700 S.W.2d 859 (Mo. Ct. App. 1985).

cites *Henderson v. St. Louis Housing Authority* (12/26/79).⁴⁷⁸

In *Boyle*, the Missouri appellate court adopted a public policy exception after an exhaustive survey of both Missouri and other states' law.⁴⁷⁹ *Henderson* had allowed a claim under the workers' compensation statute where employees alleged they had been discharged for filing claims.⁴⁸⁰ Because the Missouri workers' compensation statute explicitly allows such claims,⁴⁸¹ and because no mention is made in *Henderson* of the at-will rule (as the defendant's claim is that the plaintiff failed to prove his case),⁴⁸² *Boyle* is the appropriate case from which to date the exception.

2. Implied Contract

I cite *Arie v. Intertherm, Inc.* (1/18/83).⁴⁸³ Dertouzos and Karoly also cite this case. Krueger does not cite a case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

*Montana*⁴⁸⁴

1. Public Policy

I cite *Keneally v. Orgain* (1/30/80).⁴⁸⁵ Krueger⁴⁸⁶ and Dertouzos and Karoly both cite this case.

478. 605 S.W.2d 800 (Mo. Ct. App. 1979).

479. *Boyle*, 700 S.W.2d at 871-78.

480. *Henderson*, 605 S.W.2d at 800. The same issue was present in *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. 1984) (en banc).

481. MO. REV. STAT. § 287.780 (1993).

482. *Henderson*, 605 S.W.2d at 802.

483. 648 S.W.2d 142 (Mo. Ct. App. 1983).

484. For a comprehensive analysis of the interplay between Montana's code provisions and court decisions in this area see Morriss, *Plenty of Laws*, *supra* note 185.

485. 606 P.2d 127 (Mont. 1980).

486. Krueger cites the case as "Kenealy". Krueger, *supra* note 8, unpublished appendix (on file with author).

2. Implied Contract

I use the *Montana Wrongful Discharge from Employment Act* (effective July 1, 1987).⁴⁸⁷ Dertouzos and Karoly also cite the statute. Krueger cites *Gates v. Life of Montana Insurance Co.* (1/5/82).⁴⁸⁸ *Gates* rejected a claim under an employment manual, citing the fact that it had been distributed after employment began and relying on the Kansas Supreme Court's decision in *Johnson v. National Beef Packing Co.*⁴⁸⁹ As there were no dicta indicating sympathy toward the exception and as *Johnson* is a particularly firm rejection of the theory, *Gates* is an inappropriate basis for the exception. It is not surprising that no implied contract exception developed in Montana, despite its status as one of the most pro-employee jurisdictions, given the wide reach of the implied covenant of good faith and fair dealing, which is based on *Gates*.⁴⁹⁰

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Gates v. Life of Montana Insurance Co.* (1/5/82).⁴⁹¹ Krueger and Dertouzos and Karoly also cite this case.

Nebraska

1. Public Policy

I use *Ambroz v. Cornhusker Square Ltd.* (11/25/87).⁴⁹² Dertouzos and Karoly also cite this case. Krueger does not cite a case for this exception in Nebraska.

2. Implied Contract

I cite *Morris v. Lutheran Medical Center* (11/18/83).⁴⁹³

487. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1987).

488. 638 P.2d 1063 (Mont. 1982).

489. *Id.* at 1066 (citing *Johnson v. National Beef Packing Co.*, 551 P.2d 779 (Kan. 1976)).

490. See *infra* note 491 and accompanying text.

491. 638 P.2d 1063 (Mont. 1982).

492. 416 N.W.2d 510 (Neb. 1987).

493. 340 N.W.2d 388 (Neb. 1983).

Dertouzos and Karoly also cite this case.⁴⁹⁴ Krueger does not cite a case for this exception in Nebraska.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study. In one case, the Nebraska Supreme Court stated: "Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination." *Jeffers v. Bishop Clarkson Memorial Hospital* (5/30/86).⁴⁹⁵ Although this implies that the covenant does exist in the three types of cases mentioned, those cases either fall within the public policy exception or protect employees with contracts which take them out of the at-will rule's coverage. For this reason I did not rely on *Jeffers*.

Nevada

1. *Public Policy*

I cite *Hansen v. Harrah's* (1/25/84).⁴⁹⁶ Krueger and Dertouzos and Karoly also cite this case.

2. *Implied Contract*

I use *Southwest Gas Corp. v. Ahmad* (8/31/83).⁴⁹⁷ Dertouzos and Karoly also cite this case. Krueger cites *Mannikko v. Harrah's Reno, Inc.* (2/27/86).⁴⁹⁸ That case explicitly cites *Ahmad* as the basis for the implied contract exception.⁴⁹⁹

494. Dertouzos and Karoly incorrectly list the case as "Morriss."

495. 387 N.W.2d 692, 695 (Neb. 1986).

496. 675 P.2d 394 (Nev. 1984).

497. 668 P.2d 261 (Nev. 1983).

498. 630 F. Supp. 191 (D. Nev. 1986).

499. *Id.* at 196 (citing *Ahmad*, 668 P.2d at 261-62).

3. Implied Covenant of Good Faith and Fair Dealing

I cite *K-Mart Corp. v. Ponsock* (2/24/87).⁵⁰⁰ Krueger and Dertouzos and Karoly also cite this opinion.

New Hampshire

1. Public Policy

I use *Monge v. Beebe Rubber Co.* (2/28/74).⁵⁰¹ Krueger and Dertouzos and Karoly also cite this case.⁵⁰²

2. Implied Contract

I date this exception from *Panto v. Moore Business Forms, Inc.* (8/5/88).⁵⁰³ Krueger and Dertouzos and Karoly do not cite any cases for this exception. In *Panto*, the New Hampshire Supreme Court held that a "unilateral promulgation to present at-will employees" of a statement of intent to provide benefits can modify the contract of employment.⁵⁰⁴ The difference will not affect any of the comparisons in this Article, since *Panto* was issued in August 1988 and the comparisons with the data do not rely on any decisions after their time periods.

3. Implied Covenant of Good Faith and Fair Dealing

I cite *Monge v. Beebe Rubber Co.* (2/28/74).⁵⁰⁵ Dertouzos and Karoly also cite this opinion. Krueger does not cite an opinion for this exception.

Monge was universally thought to have adopted a particularly broad version of the implied covenant of good faith and fair deal-

500. 732 P.2d 1364 (Nev. 1987).

501. 316 A.2d 549 (N.H. 1974).

502. *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980), reinterpreted *Monge* to be a public policy exception to the at-will rule. However, even prior to *Dorr*, public policy claims were clearly within *Monge*. See *supra* note 6 (providing a more extended discussion of *Monge* and *Dorr*).

503. 547 A.2d 260 (N.H. 1988).

504. *Id.* at 261.

505. 316 A.2d 549 (N.H. 1974).

ing until the New Hampshire Supreme Court announced in 1980 that *Monge* was actually a public policy exception.⁵⁰⁶ Thus the implied covenant should not be considered to have continued after 1980.

New Jersey

1. *Public Policy*

I cite *Pierce v. Ortho Pharmaceutical Corp.* (7/28/80).⁵⁰⁷ Krueger and Dertouzos and Karoly also cite this opinion.

2. *Implied Contract*

I use *Woolley v. Hoffman-La Roche Inc.* (5/9/85).⁵⁰⁸ Krueger and Dertouzos and Karoly also cite this opinion.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

New Mexico

1. *Public Policy*

I date this exception from *Vigil v. Arzola* (7/5/83).⁵⁰⁹ Dertouzos and Karoly also cite this opinion. Krueger does not cite an opinion for this exception. New Mexico had previously rejected a public policy argument in a case involving the worker's compensation law, holding that it was a matter for the legislature in *Bottijliso v. Hutchinson Fruit Co.* (9/22/81).⁵¹⁰ In *Vigil*, however, the court held that as the at-will rule had been judicially created, it could be modified outside of comprehensive statutory schemes like

506. *Dorr*, 414 A.2d at 1274. See *supra* note 6 (providing an extended discussion of *Monge* and *Dorr*).

507. 417 A.2d 505 (N.J. 1980).

508. 491 A.2d 1257 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985).

509. 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd*, 687 P.2d 1038 (N.M. 1984).

510. 635 P.2d 992 (N.M. Ct. App. 1981).

workers' compensation.⁵¹¹

2. Implied Contract

I cite *Forrester v. Parker* (2/1/80).⁵¹² Krueger and Dertouzos and Karoly also cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

New York

1. Public Policy

I do not view New York as having adopted this exception. Krueger does not cite a case for this exception. Dertouzos and Karoly cite *Chin v. AT&T Co.* (7/17/78).⁵¹³ Dertouzos and Karoly also cite *Murphy v. American Home Products Corp.*,⁵¹⁴ in which New York's highest court rejected the public policy exception.

In *Chin*, a trial court rejected a claim of "abusive discharge" by holding that the plaintiff had failed to persuade the court that New York public policy barred discharge of at-will employees due to the employees' political beliefs and associations.⁵¹⁵ The *Chin* court, after noting that the public policy exception had not yet been recognized in New York, stated

it is appropriate, on a motion of this nature [motion to dismiss for failure to state a claim], to examine the elements of the cause of action to determine whether the complaint alleges sufficient facts upon which relief can be granted at trial. Since plaintiff is proceeding on a cause of action not presently recognized in this state, he bears a heavy burden of demonstrating that this new cause of ac-

511. *Vigil*, 699 P.2d at 620.

512. 606 P.2d 191 (N.M. 1980).

513. 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978).

514. 448 N.E.2d 86 (N.Y. 1983).

515. *Chin*, 410 N.Y.S.2d at 741.

tion should be adopted.⁵¹⁶

Given this language, it is difficult to argue that *Chin* represented anything more than a careful analysis of a motion to dismiss. There is no dicta indicating a favorable view of the doctrine in question.

Finally, it is worth noting that *Murphy*, which rejects the public policy exception, does not mention *Chin*, an indication that *Chin* was not thought to have suggested the exception might exist.⁵¹⁷ The lack of any other published opinions in the almost five years between *Chin* and *Weiner* reinforce the view that *Chin* was not seen as a signal that the door had opened to such claims.

2. Implied Contract

I use *Weiner v. McGraw-Hill, Inc.* (11/18/82).⁵¹⁸ Krueger and Dertouzos and Karoly also cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

North Carolina

1. Public Policy

I date this exception from *Sides v. Duke Hospital* (5/7/85).⁵¹⁹ Krueger and Dertouzos and Karoly also cite this case.

2. Implied Contract

This exception was not adopted in the period under study.

516. *Id.* at 740.

517. See *Murphy*, 448 N.E.2d 86.

518. 443 N.E.2d 441 (N.Y. 1982).

519. 328 S.E.2d 818 (N.C. Ct. App. 1985).

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

North Dakota

1. *Public Policy*

I date this exception from *Krein v. Marian Manor Nursing Home* (11/19/87).⁵²⁰ Krueger and Dertouzos and Karoly also cite this case.

2. *Implied Contract*

I cite *Hammond v. North Dakota State Personnel Board* (2/23/84).⁵²¹ Krueger does not cite a case for the implied contract exception. Dertouzos and Karoly cite *Bailey v. Perkins Restaurants, Inc.* (12/16/86).⁵²²

In *Hammond*, the North Dakota Supreme Court held that a state agency which had promulgated a *Personnel Policies Manual* "must be held accountable under those provisions in its employment relationship with" the employee.⁵²³ Although *Hammond* involved a public employer, the holding does not rely on the public character of the employer.⁵²⁴ *Bailey* discussed *Hammond* in the context of a private employer.⁵²⁵ Further, in *Bailey* the plaintiffs cited *Hammond* as the source of the rule, indicating that the bar viewed *Hammond* as creating the exception.⁵²⁶ Further, *Bailey* concerned the effect of a disclaimer in the employment manual, not whether the manual itself was part of the contract.⁵²⁷ As the effectiveness of the disclaimer is an issue only if the manual is otherwise potentially effective, this further supports the rule predating *Bailey*.

520. 415 N.W.2d 793 (N.D. 1987).

521. 345 N.W.2d 359 (N.D. 1984).

522. 398 N.W.2d 120, 122-23 (N.D. 1986).

523. *Hammond*, 345 N.W.2d at 361.

524. *See id.*

525. *Bailey*, 398 N.W.2d at 122-23.

526. *See id.*

527. *Id.*

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Ohio

1. Public Policy

I cite *Goodspeed v. Airborne Express, Inc.* (2/11/85).⁵²⁸ Krueger does not cite a case for Ohio for this exception. Dertouzos and Karoly cite this case.

Goodspeed is the earliest case adopting the exception. The Ohio Supreme Court subsequently recognized the exception in *Greely v. Miami Valley Maintenance Contractors, Inc.*⁵²⁹ and noted that this case not only found a cause of action but is cited by the BNA *Individual Employer Rights Manual* for the proposition that Ohio recognized the exception.⁵³⁰ Between *Goodspeed* and *Greely*, however, the Ohio Supreme Court decided *Phung v. Waste Management, Inc.* (4/16/86).⁵³¹ There the Court rejected a public policy claim and stated that Ohio had not yet recognized any public policy exceptions.⁵³² Dertouzos and Karoly and I consider this case to reverse the exception.

2. Implied Contract

I use *West v. Roadway Express* (3/21/82).⁵³³ Dertouzos and Karoly also cite this case. Krueger cites *Helle v. Landmark, Inc.* (3/30/84).⁵³⁴ Although *West* rejected the specific claim at issue, it carefully examined the evidence offered by the plaintiff and concluded that a contract not to fire except for just cause had not been created.⁵³⁵

528. 121 L.R.R.M. (BNA) 3216 (Ohio Ct. App. 1985).

529. 551 N.E.2d 981 (Ohio 1990).

530. *Id.* at 986 n.3.

531. 491 N.E.2d 1114 (Ohio 1986).

532. *Id.* at 1196.

533. 115 L.R.R.M. (BNA) 4553 (Ohio Ct. App. 1982), *cert. den.*, 459 U.S. 1205 (1983).

534. 472 N.E.2d 765 (Ohio Ct. App. 1984).

535. *West*, 115 L.R.R.M. (BNA) at 4555-56.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Oklahoma

1. *Public Policy*

I cite *Burke v. K-Mart Corp.* (2/7/89).⁵³⁶ Dertouzos and Karoly also cite this case. Krueger does not cite a case for this exception in Oklahoma.

2. *Implied Contract*

I date this exception from *Langdon v. Saga Corp.* (12/28/76).⁵³⁷ Krueger also cites this case. Dertouzos and Karoly cite *Hinson v. Cameron* (6/9/87).⁵³⁸ While *Hinson* is the first state supreme court case on the subject, it cites the court of appeals opinion in *Langdon*, and finds it "compatible" with a later public employee case.⁵³⁹ Because *Langdon* predates *Hinson* it is the appropriate benchmark.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was rejected by *Hinson v. Cameron* (6/9/87)⁵⁴⁰ and *Burke v. K-Mart Corp.* (2/7/89).⁵⁴¹ Many courts, however, interpreted the Oklahoma Supreme Court's decision in *Hall v. Farmers Insurance Exchange* (5/21/85),⁵⁴² which found an implied covenant in an insurance agent's contract with the insurance company, to apply to the employer-employee relationship as well.⁵⁴³ Thus from May 1985 to June 1987, it appeared that Oklahoma had adopted this exception, and I consider it to have been adopted

536. 770 P.2d 24 (Okla. 1989).

537. 569 P.2d 524 (Okla. Ct. App. 1976).

538. 742 P.2d 549 (Okla. 1987).

539. *Id.* at 555.

540. *Id.* at 554.

541. *Burke*, 770 P.2d at 26.

542. 713 P.2d 1027 (Okla. 1985).

543. *See, e.g., Grayson v. American Airlines, Inc.*, 803 F.2d 1097, 1099 (10th Cir. 1986).

during that period.

Krueger and Dertouzos and Karoly do not consider Oklahoma to have adopted this exception.

Oregon

1. Public Policy

I cite *Nees v. Hocks* (6/12/75).⁵⁴⁴ Krueger and Dertouzos and Karoly also cite this case.

2. Implied Contract

I cite *Yartsoff v. Democrat-Herald Publishing Co.* (3/28/78).⁵⁴⁵ Dertouzos and Karoly also cite this case. Krueger cites *Speciale v. Tektronix, Inc.* (2/20/79).⁵⁴⁶

Oregon courts cite *Yartsoff* as authority for implied contract claims. Two such cases are: *Simpson v. Western Graphics Corp.*⁵⁴⁷ and *Fleming v. Kids and Kin Head Start*.⁵⁴⁸ *Speciale* is a particularly inappropriate source of the rule: it concerned an appeal of a denied motion to replead a complaint after dismissal on demurrer and the standard applied was thus very low.⁵⁴⁹

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

544. 536 P.2d 512 (Or. 1975).

545. 576 P.2d 356 (Or. 1978).

546. 590 P.2d 734 (Or. Ct. App. 1979).

547. 643 P.2d 1276, 1278 (Or. 1982).

548. 693 P.2d 1363, 1364 (Or. Ct. App. 1985).

549. *Speciale*, 590 P.2d at 737.

Pennsylvania

1. Public Policy

I use *Geary v. United States Steel Corp.* (3/25/74).⁵⁵⁰ Krueger and Dertouzos and Karoly cite *Reuther v. Fowler & Williams, Inc.* (4/28/78).⁵⁵¹

In 1974, the Pennsylvania Supreme Court noted in dicta in *Geary* that

[i]t may be granted that there are areas in an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.⁵⁵²

The employer won in *Geary* because of its particular facts.⁵⁵³ The clear message of *Geary* was that the at-will rule was no longer absolute.⁵⁵⁴ *Reuther* based a public policy exception on this dicta from *Geary*.⁵⁵⁵ Federal courts in Pennsylvania have also relied on *Geary* in upholding public policy claims.⁵⁵⁶ *Geary* is thus a more appropriate basis for dating the public policy exception.

2. Implied Contract

This exception was not adopted in the period under study.

550. 319 A.2d 174 (Pa. 1974).

551. 386 A.2d 119 (Pa. Super. Ct. 1978).

552. *Geary*, 319 A.2d at 180.

553. The employer successfully argued the employee was discharged for failing to follow company procedure in making his complaint about the safety of a product, not because he complained. *Id.* at 176.

554. *See id.* at 180.

555. *Reuther*, 386 A.2d at 120-21.

556. *See, e.g., Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 897-98 (3d Cir. 1983) (citing cases).

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Rhode Island

I do not consider Rhode Island to have adopted any exceptions to the at-will rule in the period under study. Krueger also does not count Rhode Island as adopting any exceptions to the at-will rule.

Dertouzos and Karoly cite to dicta in *Volino v. General Dynamics* (4/7/88)⁵⁵⁷ as supporting a public policy exception. Although the plaintiff in *Volino* did allege that he was discharged for reporting violations of government construction standards to the Navy, the only mention of that claim is when the court notes it was not presented at the state administrative hearing at which the employee lost his bid for unemployment compensation.⁵⁵⁸ After reaffirming the at-will rule, the court also notes that the plaintiff failed to present any evidence supporting his claim and thus failed to meet his burden in creating a fact question under Rhode Island's summary judgment standard.⁵⁵⁹ Although the court could have simply stopped after stating the at-will rule, the fact that the court also mentioned that the plaintiff failed to produce any evidence supporting his theory is difficult to construe as support for the existence of a public policy exception given the strong endorsement of the at-will rule in the preceding paragraph.⁵⁶⁰ Whether *Volino* counts as an adoption of the exception will not materially affect the results of this paper since there are no observations after April 1988.

South Carolina

1. *Public Policy*

I cite *Ludwick v. This Minute of Carolina, Inc.* (11/18/85).⁵⁶¹

557. 539 A.2d 531 (R.I. 1988).

558. *Id.* at 532.

559. *Id.*

560. *Id.*

561. 337 S.E.2d 213 (S.C. 1985).

Both Krueger and Dertouzos and Karoly also cite this case.

2. Implied Contract

I date this exception from *Small v. Springs Industries, Inc.* (6/8/87).⁵⁶² Dertouzos and Karoly also cite this case. Krueger does not cite a case for this exception.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

South Dakota

1. Public Policy

I cite *Johnson v. Kreiser's, Inc.* (12/7/88).⁵⁶³ Krueger does not cite any cases for this exception. Dertouzos and Karoly cite *Tombollo v. Dunn* (1/4/84).⁵⁶⁴

In *Tombollo*, an employee alleged that she was discharged by a supervisor who was sexually harassing her.⁵⁶⁵ The Court held that any wrongful discharge claim based on those facts was barred because the plaintiff had failed to exhaust her administrative remedies under South Dakota law.⁵⁶⁶ There is nothing in this opinion which suggests that a public policy exception exists in South Dakota.

2. Implied Contract

I cite *Osterkamp v. Alkota Manufacturing, Inc.* (4/13/83).⁵⁶⁷ Krueger and Dertouzos and Karoly also cite this opinion.

562. 357 S.E.2d 452 (S.C. 1987).

563. 433 N.W.2d 225 (S.D. 1988).

564. 342 N.W.2d 23 (S.D. 1984).

565. *Id.* at 25.

566. *Id.* She had failed to appeal the dismissal of her administrative action based on a finding of the South Dakota Division of Human Rights that she had been fired for cause. *Id.* (her claims before the agency were based on the South Dakota anti-discrimination statute).

567. 332 N.W.2d 275 (S.D. 1983).

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Tennessee

1. Public Policy

I use *Clanton v. Cain-Sloan Co.* (8/20/84).⁵⁶⁸ Dertouzos and Karoly also cite this case. Krueger cites *Watson v. Cleveland Chair Co.* (7/26/85).⁵⁶⁹

In *Clanton*, the Tennessee Supreme Court created a claim for retaliatory discharges for exercising rights under the workers' compensation law.⁵⁷⁰ The Court followed the Indiana Supreme Court's opinion in *Frampton v. Central Indiana Gas Co.*,⁵⁷¹ noting that the Tennessee and Indiana statutes were similar.⁵⁷² *Watson*, which Krueger cites, refers to *Clanton* as the source of the exception, saying "Tennessee recently recognized one exception to this rule in *Clanton*."⁵⁷³

2. Implied Contract

I cite *Hamby v. Genesco, Inc.* (11/5/81).⁵⁷⁴ Krueger and Dertouzos and Karoly do not cite a case for this exception. In *Hamby*, the court of appeals found that an employee handbook was part of an employee's contract of employment without any discussion of legal authority.⁵⁷⁵ Although the specific claims made in the case concerned benefits rather than the standard for discharge, court did not limit its analysis to such claims but used general language.⁵⁷⁶

568. 677 S.W.2d 441 (Tenn. 1984).

569. 122 L.R.R.M. (BNA) 2076 (Tenn. Ct. App. 1985).

570. *Clanton*, 677 S.W.2d at 445.

571. 297 N.E.2d 425 (Ind. 1973).

572. *Clanton*, 677 S.W.2d at 443.

573. *Watson*, 122 L.R.R.M. (BNA) at 2077.

574. 627 S.W.2d 373 (Tenn. Ct. App. 1981).

575. *Id.* at 376.

576. *Id.* at 375.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Texas

1. *Public Policy*

I use *Hauck v. Sabine Pilots, Inc.* (6/7/84), affirmed (4/3/85).⁵⁷⁷ Dertouzos and Karoly and I cite the court of appeals decision; Krueger cites the supreme court decision.

2. *Implied Contract*

I cite *Johnson v. Ford Motor Co.* (4/11/85).⁵⁷⁸ Krueger and Dertouzos and Karoly do not cite a case for this exception.

Johnson simply ignores the earlier decision of the Corpus Christi appellate court in *Reynolds Manufacturing Co. v. Mendoza*,⁵⁷⁹ which had rejected the exception. Shortly after *Johnson*, the Texarkana Court of Appeals followed suit on 7/9/85.⁵⁸⁰ When faced with this split, the Fifth Circuit followed *Johnson* and *United*.⁵⁸¹

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Utah

1. *Public Policy*

I cite *Berube v. Fashion Centre, Ltd.* (3/20/89).⁵⁸² Dertouzos

577. 672 S.W.2d 322 (Tex. Civ. App.—Beaumont 1984), *aff'd sub nom.* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

578. 690 S.W.2d 90 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.).

579. 644 S.W.2d 536 (Tex. Civ. App.—Corpus Christi 1982, no writ).

580. *United Transp. Union v. Brown*, 694 S.W.2d 630 (Tex. Civ. App.—Texarkana 1985, writ ref'd n.r.e.).

581. *See Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199 (5th Cir. 1987).

582. 771 P.2d 1033 (Utah 1989).

and Karoly also cite this case. Krueger does not cite a case for Utah for this exception (this case is beyond his time period).

2. Implied Contract

I cite *Rose v. Allied Development Co.* (5/13/86).⁵⁸³ Krueger and Dertouzos and Karoly do not cite a case for this exception.

Rose analyzed an implied contract claim based on statements alleged to have been made by the employer.⁵⁸⁴ Although the court found for the employer on the facts of the case, clearly an exception to the at-will rule existed.⁵⁸⁵ *Rose* cited *Bihlmaier v. Carson*⁵⁸⁶ as creating the implied contract exception.⁵⁸⁷ The cited language from *Bihlmaier* is, in full:

The general rule concerning personal employment contracts is, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.⁵⁸⁸

As this language from *Bihlmaier* is far from a clear endorsement of an exception to the at-will rule, it seems more appropriate to date the exception from *Rose*.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

583. 719 P.2d 83 (Utah 1986).

584. *Id.* at 85.

585. *Id.* at 85-86.

586. 603 P.2d 790 (Utah 1979).

587. *Rose*, 719 P.2d at 85-86 (citing *Bihlmaier v. Carson*, 603 P.2d 790, 792 (Utah 1979)).

588. *Bihlmaier*, 603 P.2d at 792 (footnote omitted).

Vermont

1. *Public Policy*

I cite *Payne v. Rozendaal* (9/26/86).⁵⁸⁹ Krueger also cites this case. Dertouzos and Karoly cite dicta in *Jones v. Keogh* (11/5/79)⁵⁹⁰ for a narrow public policy exception and *Payne* for a broad one. In rejecting a public policy claim, the *Jones* court noted:

The basic common law rule which still is widely accepted is that which was pronounced by this Court in *Mullaney v. C.H. Goss Co.*, *supra* [122 A. 430, 432 (Vt. 1923)]. Ever present in those opinions recognizing the common law rule is the concern that acceptance of a rule extending enforceable contract rights to an at will employee would destroy the mutuality of obligation extant in such employment relationships. Accordingly, courts generally have been unwilling to uphold suits by discharged employees at-will unless there is a *clear and compelling* public policy against the reason advanced for the discharge.

While full employment and employer-employee harmony are noble goals to which society aspires, they alone do not present the clear and compelling public policies upon which courts have been willing to rely in upholding an action for discharge of an employee at will. Nor is the fact that bad faith, malice and retaliation are motives upon which we look askance sufficient to impel us to find a clear and compelling public policy where, as here, there is none.⁵⁹¹

Payne later cites a fragment of this language:

In Vermont, under an "at will" employment contract, an employee may be discharged at any time with or without cause, "unless there is a *clear and compelling* public policy

589. 520 A.2d 586 (Vt. 1986).

590. 409 A.2d 581 (Vt. 1979).

591. *Id.* at 582 (citations omitted) (emphasis in original).

against the reason advanced for the discharge.”⁵⁹²

Thus *Payne*’s discussion of what “courts generally” have been unwilling to do was transformed into the definition of Vermont’s public policy exception. Justice Peck’s dissent in *Payne* notes that *Jones* is actually a unanimous endorsement of the at-will rule.⁵⁹³ Despite the *Payne* court’s reference to *Jones*, it would be difficult to construe its passing reference to “courts generally” as forecasting a change in a Vermont rule it had just endorsed.

2. Implied Contract

I cite *Sherman v. Rutland Hospital, Inc.* (8/9/85).⁵⁹⁴ Krueger also cites this case. Dertouzos and Karoly cite *Benoir v. Ethan Allen, Inc.* (7/18/86).⁵⁹⁵ *Benoir* is simply later than *Sherman* and therefore the wrong benchmark.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Virginia

1. Public Policy

I use *Bowman v. State Bank of Keysville* (6/14/85).⁵⁹⁶ Both Krueger and Dertouzos and Karoly cite this case.

2. Implied Contract

I date this exception from *Frazier v. Colonial Williamsburg Foundation* (9/9/83).⁵⁹⁷ Krueger and Dertouzos and Karoly do not cite a case.

592. *Payne*, 520 A.2d at 588 (citing *Jones v. Keogh*, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979) (emphasis in original)).

593. *Id.* at 591.

594. 500 A.2d 230 (Vt. 1985).

595. 514 A.2d 716 (Vt. 1986).

596. 331 S.E.2d 797 (Va. 1985).

597. 574 F. Supp. 318 (E.D. Va. 1983).

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Washington

1. *Public Policy*

I cite *Thompson v. St. Regis Paper Co.* (7/5/84).⁵⁹⁸ Krueger also cites this case. Dertouzos and Karoly cite dicta in *Roberts v. Atlantic Richfield Co.* (8/18/77).⁵⁹⁹

Although the court does discuss several public policy cases from other states in *Roberts*, it concludes:

On the record before us we can neither reach the question of whether we should totally abrogate the common law terminable-at-will doctrine nor the question of whether we should follow the *Monge* court and make an exception thereto based on bad faith and malice. While the future of this doctrine is a compelling issue, it is one which must be left for another day and different facts.⁶⁰⁰

This is not the sort of suggestion as to the future course of the law that implies a change is coming soon (and the change took almost seven years to arrive).

2. *Implied Contract*

I cite *Roberts v. Atlantic Richfield Co.* (8/18/77).⁶⁰¹ Dertouzos and Karoly also cite this case. Krueger cites *Saruf v. Miller* (11/9/78).⁶⁰²

Although the employee lost in *Roberts*, the court clearly recog-

598. 685 P.2d 1081 (Wash. 1984).

599. 568 P.2d 764 (Wash. 1977).

600. *Id.* at 770.

601. 568 P.2d 764 (Wash. 1977).

602. 586 P.2d 466 (Wash. 1978).

nized the existence of an implied contract exception.⁶⁰³ In *Saruff* the court acknowledged *Roberts*' creation of the exception, saying that in *Roberts* "we recognized that allegations similar to those made by *Saruff* may give rise to an implied contract of employment."⁶⁰⁴

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

West Virginia

1. *Public Policy*

I use *Harless v. First National Bank* (7/14/78).⁶⁰⁵ Krueger also cites this case; Dertouzos and Karoly cite it for a narrow public policy exception and cite *Cordle v. General Hugh Mercer Corp.* (7/13/84)⁶⁰⁶ for a broad exception.

2. *Implied Contract*

I cite *Cook v. Heck's Inc.* (4/4/86).⁶⁰⁷ Krueger and Dertouzos and Karoly both cite this case.

3. *Implied Covenant of Good Faith and Fair Dealing*

This exception was not adopted in the period under study.

Wisconsin

1. *Public Policy*

I use *Ward v. Frito-Lay, Inc.* (1/28/80).⁶⁰⁸ Krueger also cites this case. Dertouzos and Karoly cite *Brockmeyer v. Dun &*

603. *Roberts*, 568 P.2d at 770.

604. *Saruff*, 586 P.2d at 469.

605. 246 S.E.2d 270 (W. Va. 1978).

606. 325 S.E.2d 111 (W. Va. 1984).

607. 342 S.E.2d 453 (W. Va. 1986).

608. 290 N.W.2d 536 (Wis. Ct. App. 1980).

Bradstreet (7/1/83).⁶⁰⁹

Brockmeyer is the first state supreme court ruling, but *Ward* is widely recognized as the first appellate opinion in Wisconsin to create a public policy exception.⁶¹⁰

2. Implied Contract

I cite *Ferraro v. Koelsch* (6/5/85).⁶¹¹ Both Krueger and Dertouzos and Karoly also cite this case.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

Wyoming

1. Public Policy

I use *Griess v. Consolidated Freightways* (7/5/89).⁶¹² Krueger cites no case. Dertouzos and Karoly cite dicta in *Allen v. Safeway Stores, Inc.* (5/2/85).⁶¹³

Griess involved a claim of retaliation for filing a workers' compensation case.⁶¹⁴ *Allen* rejected several public policy claims made by two discharged employees.⁶¹⁵ The rationale for doing so was that statutory remedies existed to protect the public policies which the court found to have been valid.⁶¹⁶ In doing so, it defined the requirements for a "tort action premised on public policy" in general terms.⁶¹⁷ Presumably, that is the dicta on which the Dertouzos and Karoly study relied. That language is too general to

609. 335 N.W.2d 834 (Wis. 1983).

610. See, e.g., BUREAU OF NATIONAL AFFAIRS, INDIVIDUAL EMPLOYMENT RIGHTS MANUAL 505:891 (December, 1988).

611. 368 N.W.2d 666 (Wis. 1985).

612. 776 P.2d 752 (Wyo. 1989).

613. 699 P.2d 277 (Wyo. 1985).

614. *Griess*, 776 P.2d at 752.

615. *Allen*, 699 P.2d at 282-84.

616. *Id.* at 284.

617. *Id.* (stating the requirements to be the absence of a remedy and a discharge in violation of well-established public policy).

suggest a public policy exception exists. *Griess* cited *Allen* for both this language and for the proposition that Wyoming has been "cautious" in modifying the at-will rule.⁶¹⁸

2. Implied Contract

I cite *Mobil Coal Producing, Inc. v. Parks* (8/13/85).⁶¹⁹ Dertouzos and Karoly also cite this case. Krueger does not cite a case for this exception.

3. Implied Covenant of Good Faith and Fair Dealing

This exception was not adopted in the period under study.

618. *Griess*, 776 P.2d at 753-54 (citing *Allen*, 699 P.2d at 284 and 277).

619. 704 P.2d 702 (Wyo. 1985).

Appendix C: Econometric Details

In this appendix I provide those details of the data analysis used in Part II which do not relate to dating the common law changes. The data on individuals and their jobs comes from the *Panel Study of Income Dynamics* (PSID), one of two panel data sets which include information on job tenure.⁶²⁰ The PSID offers the advantage of providing panel data covering the period of interest. The disadvantage is the presence of some inconsistency in the PSID's tenure data.⁶²¹ Despite this problem, the PSID has two advantages for the analysis of the impact of the common law erosion of the at-will rule. First, it contains a large nationally representative sample. Second, unlike the *National Longitudinal Survey of Youth* (NLSY), it includes prime age men, who are most likely to be affected by the changes in the at-will rule.

Since the PSID does not explicitly identify employers,⁶²² I identify when an individual changes employers through other variables. Brown and Light found that the method of deriving job

620. The other is the *National Longitudinal Survey of Youth* (NLSY). A year's delay in obtaining approval from a university official for obtaining the restricted NLSY data set containing geographic information prevents inclusion of NLSY data here. A future paper will present those results.

621. See James Brown & Audrey Light, *Interpreting Panel Data on Job Tenure*, 10 J. LAB. ECON. 219, 220 (1992). Briefly, the sources of the inconsistency are the lack of information about employers, reporting errors, the ambiguous wording of the questions about job tenure, and the coding of the answers. *Id.* at 220-22. The inconsistency makes evaluating the effect of tenure on job duration difficult and requires relatively strong assumptions to make the data useable.

622. Interview years 1979 and 1980 present additional problems. The PSID questionnaire for 1979 and 1980 did not contain a job tenure question. The question took the general form: "How long have you worked for your present employer?" INSTITUTE FOR SOCIAL RESEARCH, A PANEL STUDY OF INCOME DYNAMICS; PROCEDURES AND TAPE CODES 16 (WAVE XIV, 1981) [hereinafter ISR]. The answers could be recorded in either years or months, see *id.*, leading to a potential rounding error where a job which began in January of year t is reported in a March interview for interview year t as having 2 months' tenure and in a March interview for interview year $t+4$ as having 4 years' tenure, rather than 50 months. Rather than simply discard all observations for these two years, which would lose information on some changes in the law, I adopted the following procedure:

If the subject was in the sample for 1978 and the job-ending question and time-in-position question did not indicate a job change, I incremented the tenure reported in 1978 by elapsed calendar time. If the subject was not in the 1978 sample, then I used the tenure reported in interview year 1981 for those present in the sample for that year, subtracting elapsed calendar time. For those not present in either 1978 or 1981, but present in either 1979 or 1980 or both, and whose job-ending question indicated the job had not ended, I relied on the time-in-position data to assign the tenure values.

changes can significantly affect the results.⁶²³ Because of this sensitivity, I use two different methods to determine when jobs end and present results for both. In Method T, I record the end of a job wherever reported tenure drops in consecutive months or where an individual reports not working in a month following a month in which employment is reported.⁶²⁴ In Method P, I use the position questions to identify the end of a job.⁶²⁵

623. Brown & Light, *supra* note 621, at 221. One method is to use discontinuities in reported tenure to identify changes of employers. As Brown and Light found, however, reported tenure is not correlated well with elapsed calendar time, suggesting that job changes cannot be identified simply by assuming that whenever reported tenure is less than elapsed time since the previous interview a new job has begun. *Id.* A second method of partitioning the data into jobs uses the PSID's data on current position. Beginning in interview year 1976, the PSID contained a question which asked about tenure in the current position. ISR, *supra* note 622, at 15 (WAVE IX, 1976). If the answer was less than 12 months in interview years 1976-1983, then the interviewer also asked about why the previous job ended. *See id.* In interview years after 1983, the individual was asked when the present position began, and the questions about why the last position ended were asked if the date reported was January of the preceding year or later. *See, e.g., id.* at 13 (WAVE XVIII, 1985). By using the existence of an answer to these questions, the data can be partitioned into jobs. The question asked was a variant on the following example from interview year 1980: "What happened to the job you had before—did the company go out of business, were you laid off, promoted, were you not working, or what?" *Id.* at 14 (WAVE XIII, 1980). The answers which were coded individually were: (1) Company folded, etc.; (2) Strike, lockout; (3) Laid off, fired; (4) Quit, resigned, retired, pregnant, etc.; (7) Other; (8) Job done; (9) Not applicable, don't know; and (0) Inappropriate (which includes those still working for the employer). *Id.* The 1988 responses were: (1) Company folded, etc. - 1%; (2) Strike, lockout - 0%; (3) Laid off, fired - 1.7%; (4) Quit, resigned, retired, pregnant, etc. - 9.4%; (7) Other - 0.3%; (8) Job done - 0.5%; (9) Not applicable, don't know - 0.4%; and (0) Inappropriate (which includes those still working for the employer) - 86.7%. *Id.* at 184 (WAVE XXI, 1988). Even aside from any measurement error in self-reports of firings, the PSID questionnaire does not separate firings from layoffs. As Brown and Light show, this results in quite different job assignments than produced by the change in tenure method. Brown & Light, *supra* note 621, tbl. 3, at 231.

624. Roughly consistent with Brown and Light's Partition T, this method finds more ends to jobs than their method since it does not require that the following month be reported to be on a new job. *See* Brown & Light, *supra* note 621, at 223-26.

625. This method is similar to Brown and Light's Partition P. *Id.* at 226-28. As discussed earlier, the PSID data on jobs are less than perfect. *See supra* note 621. Two approaches are possible in handling inconsistencies in job-related data. One would be to force consistency by choosing the first or last observation of a job as the source of information on the job. An alternative rule for forcing consistency would be to choose the values consistent with the majority of observations of the job. *See* Brown & Light, *supra* note 621, at 232 (describing ways to implement these varying methodologies). This would be necessary if the unit of analysis were the job. Since the unit of analysis in this case is not the job, but rather a month on a job, I used an alternative method. For each observation, I calculated which job-months were covered by that observation. This was necessary as individuals are not always interviewed during the same month of the year. For example, a person could have been interviewed in March 1977, in April 1978, and in

Since this Article seeks to exploit the cross-state, cross-time variation in the employment-at-will rule, the location of a person at a particular time is crucial since it controls assignment of the legal-environment variables. Although, as with other parts of the PSID, the data are less than ideal in this regard, a few reasonable assumptions are sufficient to locate most individuals.⁶²⁶ Finally, I

March 1979. The job information from the 1978 interview would apply to the period April 1977-April 1978, while the job information from the 1979 interview would apply to the period May 1978-March 1979. The information from that observation was then attributed to the applicable months.

A similar method of division of data was applied to personal data with two important differences. First, some data on individuals are not collected each year. Education, for example, is collected only when a individual becomes head of a family unit and in certain other years. All heads of households were asked about education in 1968 and 1975 or in the initial year a head is present. ECONOMIC BEHAVIOR PROGRAM, INSTITUTE FOR SOCIAL RESEARCH, USER GUIDE TO THE PANEL STUDY OF INCOME DYNAMICS D-8-9 (1984). Second, some information is collected on a calendar-year basis, rather than on an interview-year basis. For example, individuals are asked whether they have moved since the last interview, but are asked what their family income was for the last calendar year. Compare, for example, interview year 1988 questions A18 ("Have you (HEAD) moved any time since the spring of 1987?") and G13 ("How much did you (HEAD) earn altogether from *wages or salaries* in 1987, that is, before anything was deducted for taxes or other things?"). ISR, *supra* note 622, at 9, 35 (WAVE XXI, 1988) Calendar-year data are distributed among job-months on a calendar-year basis. A job-month observation may contain data from interview year *t* on a job, but from interview year *t-1* or *t+1* on personal characteristics. Data collected less than annually were distributed beginning at the time of collection.

626. Ideally, the PSID questionnaire would ask individuals where they lived in each month of the past year. Next best would be questions about the number of moves combined with some information about when the individual moved. What the PSID actually contains is a set of two questions:

1. Have you (HEAD) moved since the spring of 19xx? ISR, *supra* note 622, at 14 (WAVE XXI, 1988); *Id.* at 10 (WAVE XX, 1987); *Id.* at 10 (WAVE XIX, 1986); *Id.* at 10 (WAVE XVIII, 1985); *Id.* at 8 (WAVE XVII, 1984); *Id.* at 16 (WAVE XVI, 1983); *Id.* at 14 (WAVE XV, 1982); *Id.* at 14 (WAVE XIV, 1981); *Id.* at 12 (WAVE XIII, 1980); *Id.* at 12 (WAVE XII, 1979); *Id.* at 25 (WAVE XI, 1978); *Id.* at 11 (WAVE X, 1977); *Id.* at 12 (WAVE IX, 1976).

If the answer is yes, the individual is asked:

2. What month was that? *Id.* at 14 (WAVE XXI, 1988); *Id.* at 10 (WAVE XX, 1987); *Id.* at 10 (WAVE XIX, 1986); *Id.* at 10 (WAVE XVIII, 1985); *Id.* at 8 (WAVE XVII, 1984); *Id.* at 16 (WAVE XVI, 1983); *Id.* at 14 (WAVE XV, 1982); *Id.* at 14 (WAVE XIV, 1981); *Id.* at 12 (WAVE XIII, 1980); *Id.* at 12 (WAVE XII, 1979); *Id.* at 25 (WAVE XI, 1978); *Id.* at 11 (WAVE X, 1977); *Id.* at 12 (WAVE IX, 1976). The month moved has been asked only since 1975, making determining pre-1975 location impossible for interstate movers.

This can be combined with information on the current state and state from the past year, if the individual were the head of household and in the sample in the immediately prior year, and the interview dates for both years, to assign a state to each month of the period between interviews.

This is less than ideal for several reasons. First, an individual may not appear in the

used information only from interview years 1976⁶²⁷ through 1988.⁶²⁸ Table C-1 and Table C-2 give the descriptive statistics

prior year sample as a head of household. For those individuals who both moved during the past interview year and became new heads of household in that year, I discarded months prior to the move since the prior state was unknown. Second, all we know about movers is that they moved at least once during the past year. As they may have moved several times and lived in more than two states, this procedure may incorrectly assign those individuals to states during months between moves. For example, suppose an individual lived in New Jersey at the time of his 1978 interview, in March. He moved to Pennsylvania in July 1978, and then back to New Jersey in January 1979. The procedure described above will incorrectly assign this individual to New Jersey for the entire time between March 1978 and his 1979 interview.

This problem is less serious than it seems, however. It potentially affects only the movers. (Twenty-two percent of individuals in interview year 1988, for example.) JAMES N. MORGAN, PANEL STUDY OF INCOME DYNAMICS 1968-1988 (WAVES I-XXI) [computer file] (Survey Research Center prod.) (Inter-university Consortium for Political and Social Research dist. 1991). Some multiple movers may be relocating only within the same state, in which case they have been correctly assigned. In addition, as described above, observations are based only on months during which an individual is employed. A multiple mover who is motivated by job search, for example, would therefore only be in the sample while he is employed. Since locating a job would end the search, and presumably the moves as well, the months during which he is searching and misassigned will not be in the sample.

Interview year 1982 presents an additional problem. In that year the PSID questionnaire asked only if the individual moved, not in what month the person moved. ISR, *supra* note 622, at 14 (WAVE XV, 1982). (The omission appears to have simply been an oversight.) This presents a problem for those individuals who both moved and changed states. Since the location is critical to the assignment of the legal variables, the observations for interview year 1982 for these individuals were dropped from the sample.

A final problem with location comes from the method of bracketing the interview dates. Until interview year 1980, the interview date is present in the data as a code representing a range of dates. For brackets which fall entirely within a single month, the month assigned was the month containing the bracket period. The bracket dates for an additional set of respondents (55.3% of 1976 respondents, 64.5% of 1977 respondents, 39.5% of 1978 respondents, and 35.7% of 1979 respondents, MORGAN, *supra*) included one to three days (most brackets contained 14 days) from a second month. These were assigned the month in which the majority of days fell. A small number of respondents had dates given as after July 1st (2.3% of 1976 respondents, 1.2% of 1977 respondents, 0.5% of 1978 respondents, and 1.0% of 1979 respondents, *id.*) and were assigned to July. Finally, a very small number were listed as "not applicable" or "don't know" (0.1% of 1976 respondents, 0.4% of 1977 respondents, 0.3% of 1978 respondents, and 0.4% of 1979 respondents, *id.*); these individuals were dropped.

627. I also used location information from interview year 1975 to locate people during 1975-76.

628. Pre-1976 interviews did not include sufficient detail to locate individuals who moved during the year. Data from PSID interview years 1968-74 has more serious problems with job tenure. See Brown & Light, *supra* note 621, at 239-45 (discussing various problems associated with this body of data). The consequences of excluding pre-1976 data are relatively small. As Table C-3 shows, only a small percentage of changes in the law under all three dating methods used occurred before January 1976, and thus relatively few states who switch are not potentially present in both pre- and post-change status.

for the samples. Additional tables which report results not reported in the body of the Article are available from the author.

Table C-1 Descriptive Statistics, All Observations

Variable	Morris		Krueger/RAND	
	Nonunion	Union	Nonunion	Union
ENDJOBP	0.03 (0.16)	0.02 (0.13)	0.03 (0.16)	0.02 (0.13)
ENDJOB	0.04 (0.19)	0.03 (0.17)	0.04 (0.19)	0.03 (0.17)
PUBPOL-M	0.42 (0.49)	0.46 (0.50)	0.42 (0.49)	0.46 (0.50)
PUBPOL-K	0.34 (0.48)	0.37 (0.48)	0.34 (0.48)	0.37 (0.48)
PUBPOL-R	0.43 (0.50)	0.48 (0.50)	0.43 (0.50)	0.47 (0.50)
CONT-M	0.30 (0.46)	0.29 (0.45)	0.30 (0.46)	0.29 (0.45)
CONT-K	0.21 (0.40)	0.20 (0.40)	0.21 (0.40)	0.20 (0.40)
CONT-R	0.24 (0.43)	0.23 (0.42)	0.24 (0.43)	0.23 (0.42)
ICOV-M	0.06 (0.23)	0.04 (0.19)	0.06 (0.23)	0.04 (0.19)
ICOV-K	0.06 (0.23)	0.04 (0.21)	0.06 (0.23)	0.04 (0.21)
ICOV-R	0.05 (0.22)	0.04 (0.19)	0.05 (0.22)	0.04 (0.19)
EDUC	13.24 (3.45)	11.90 (3.57)	13.25 (3.45)	11.90 (3.57)
TENURE	87.33 (101.0)	127.3 (115.5)	87.4 (101.1)	127.6 (115.6)
AGE	36.77 (11.68)	38.59 (11.54)	36.76 (11.67)	38.60 (11.54)
KIDS	1.09 (1.20)	1.31 (1.28)	1.09 (1.20)	1.31 (1.28)
PAYBYHR	0.39 (0.49)	0.87 (0.34)	0.39 (0.49)	0.86 (0.34)
MARRIED	0.83 (0.37)	0.89 (0.31)	0.83 (0.38)	0.89 (0.31)
COLLEGE	0.29 (0.45)	0.07 (0.25)	0.29 (0.45)	0.07 (0.25)
INDUSTRY	AGFOR	0.03 (0.16)	0.03 (0.16)	0.004 (0.06)
	MINE	0.02 (0.13)	0.02 (0.13)	0.02 (0.14)
	CNSTR	0.08 (0.27)	0.08 (0.27)	0.08 (0.26)
	TRANS	0.05 (0.22)	0.05 (0.22)	0.12 (0.32)
	NDMFG	0.12 (0.33)	0.12 (0.33)	0.14 (0.35)
	UTIL	0.04 (0.19)	0.04 (0.19)	0.09 (0.29)
	TRADE	0.21 (0.41)	0.21 (0.41)	0.09 (0.29)
	FIN	0.06 (0.24)	0.06 (0.24)	0.006 (0.08)
	SRC	0.05 (0.21)	0.04 (0.21)	0.02 (0.13)
OCCUPATION	PROF	0.20 (0.40)	0.20 (0.40)	0.06 (0.233)
	MGT	0.21 (0.40)	0.21 (0.41)	0.03 (0.18)
	CLERK	0.05 (0.22)	0.05 (0.22)	0.04 (0.22)
	OPER	0.09 (0.29)	0.09 (0.29)	0.27 (0.44)
	TOPER	0.05 (0.22)	0.05 (0.22)	0.11 (0.32)
N	153,015	54,349	152,689	54,204

Table C-2 Descriptive Statistics, Under Forty

Variable		Morris		Krueger/RAND	
		Nonunion	Union	Nonunion	Union
ENDJOBP		0.03 (0.18)	0.02 (0.14)	0.03 (0.18)	0.02 (0.14)
ENDJOBT		0.04 (0.19)	0.03 (0.18)	0.04 (0.19)	0.03 (0.18)
PUBPOL-M		0.43 (0.49)	0.44 (0.50)	0.43 (0.49)	0.44 (0.50)
PUBPOL-K		0.35 (0.48)	0.36 (0.48)	0.35 (0.48)	0.36 (0.48)
PUBPOL-R		0.43 (0.50)	0.44 (0.50)	0.44 (0.50)	0.45 (0.50)
CONT-M		0.31 (0.46)	0.28 (0.45)	0.31 (0.46)	0.28 (0.45)
CONT-K		0.21 (0.41)	0.21 (0.40)	0.21 (0.41)	0.21 (0.41)
CONT-R		0.24 (0.43)	0.24 (0.43)	0.24 (0.43)	0.24 (0.43)
ICOV-M		0.06 (0.24)	0.03 (0.18)	0.06 (0.24)	0.03 (0.18)
ICOV-K		0.06 (0.24)	0.04 (0.19)	0.06 (0.24)	0.04 (0.19)
ICOV-R		0.05 (0.22)	0.03 (0.17)	0.05 (0.22)	0.03 (0.17)
EDUC		13.51 (2.68)	12.44 (2.51)	13.51 (2.68)	12.44 (2.51)
TENURE		54.44 (61.93)	75.47 (63.24)	54.45 (61.90)	75.58 (63.26)
AGE		29.76 (5.03)	30.1 (4.9)	29.76 (5.03)	30.11 (4.91)
KIDS		1.20 (1.18)	1.53 (1.24)	1.20 (1.18)	1.53 (1.24)
PAYBYHR		0.42 (0.49)	0.89 (0.32)	0.42 (0.49)	0.89 (0.32)
MARRIED		0.81 (0.39)	0.89 (0.34)	0.81 (0.39)	0.87 (0.34)
COLLEGE		0.30 (0.46)	0.08 (0.27)	0.30 (0.46)	0.08 (0.27)
INDUST	AGFOR	0.03 (0.16)	0.08 (0.27)	0.03 (0.16)	0.005 (0.07)
	MINE	0.02 (0.14)	0.02 (0.13)	0.02 (0.14)	0.02 (0.13)
	CONSTR	0.09 (0.29)	0.08 (0.27)	0.09 (0.29)	0.11 (0.31)
	TRANS	0.05 (0.21)	0.11 (0.31)	0.05 (0.22)	0.11 (0.31)
	NDURMFG	0.12 (0.33)	0.13 (0.33)	0.13 (0.33)	0.13 (0.33)
	UTIL	0.04 (0.19)	0.12 (0.32)	0.04 (0.19)	0.12 (0.32)
	TRADE	0.22 (0.42)	0.10 (0.29)	0.22 (0.42)	0.10 (0.29)
	FINANCE	0.05 (0.23)	0.004 (0.06)	0.05 (0.23)	0.003 (0.06)
OCCUP	SRC	0.04 (0.20)	0.02 (0.13)	0.04 (0.20)	0.01 (0.13)
	PROF	0.21 (0.40)	0.06 (0.24)	0.21 (0.40)	0.06 (0.24)
	MGT	0.19 (0.39)	0.02 (0.15)	0.19 (0.39)	0.02 (0.15)
	CLERK	0.08 (0.27)	0.04 (0.10)	0.06 (0.23)	0.04 (0.21)
	OPER	0.11 (0.30)	0.29 (0.45)	0.10 (0.30)	0.29 (0.45)
P	TOPER	0.06 (0.23)	0.10 (0.31)	0.06 (0.23)	0.10 (0.30)
	N	102,143	31,800	101,948	31,680